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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1041

THE WESTERN PACIFIC RAILROAD COMPANY, and the SOUTHERN PACIFIC COMPANY, suing on their own behalf and on behalf of all other railroads similarly situated, *Petitioners,*

vs.

HOWARD W. HABERMEYER, THOMAS M. HEALY, and A. E. LYON, individually and as members of the Railroad Retirement Board; SAMUEL CHMELL, individually and as Director, Bureau of Unemployment and Sickness Insurance of said Board; DEAN W. STODDARD, individually and as Chief, Division of Claims Operations of said Board; and H. H. DASHIELL, Director, Atlanta Region; JOHN J. FINNERTY, Director, New York Region; FRANK J. SHEA, Director, Cleveland Region; CHARLES L. HOLLER, Director, Chicago Region; RAYMOND W. LUSK, Director, Dallas Region; WILLIAM R. CALWELL, Director, Kansas City Region; WALTER J. MACKLIN, Director, San Francisco Region, each individually and as Directors of said Regions under said Board, *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BURNHAM ENERSEN
601 California Street
San Francisco, California 94108

RICHARD MURRAY
601 California Street
San Francisco, California 94108
Attorneys for Petitioners

Of Counsel
McCUTCHEN, DOYLE, BROWN & ENERSEN
601 California Street
San Francisco, California 94108

GORG PRINTING COMPANY OF CALIFORNIA, 545 FIRST STREET, SAN FRANCISCO, CALIF.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit in its cases No. 20785 and No. 21377.

OPINIONS BELOW

Petitioners seek review of a decision of the Court of Appeals for the Ninth Circuit upon consolidated appeals from two decisions of the District Court which were rendered in a single action below. The opinion of the Court of Appeals is reported at 382 F.2d 1003 and appears at Appendix A, pp. 1a-11a, *infra*. The opinion of the United States District Court for the Northern District of California in case No. 20785 is reported at 248 F. Supp. 44 and appears at Appendix B, pp. 12a-17a, *infra*. The unreported memorandum decision of the District Court in case No. 21377 (R.V. 4, p. 233)[1] appears at Appendix C, pp. 18a-19a, *infra*.

JURISDICTION

The judgments of the Court of Appeals were entered on August 23, 1967. (Appendices G, H, pp. 34a-35a, *infra*). A timely petition for rehearing was filed on September 21, 1967 and was denied without opinion on October 25, 1967. (R.V.1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Respondents, who are members and officials of the Railroad Retirement Board, chose to pay unemployment benefits totalling more than $2,500,000 to more than three thousand railroad fire-

1. "R.V." references are to the certified transcript of the record in the Court of Appeals which was filed with the Clerk of this Court pursuant to Rule 21, and to the particular volume and (where applicable) page thereof as designated by the Clerk of the Court of Appeals. Volume 1 of the transcript, consisting of proceedings in the Court of Appeals, is not paginated and, with respect to that volume, page numbers cannot be provided.

men who had elected to terminate their employment with the railroads in return for substantial severance allowances. All such unemployment benefits have come from the Railroad Unemployment Insurance Account, a fund maintained entirely by the statutory contributions of railroad employers, including petitioners. Petitioners assert that, in paying the challenged benefits, respondents have violated the express limitations of their governing statute and have failed to follow the procedures which it commands. The Court of Appeals affirmed an award of summary judgment in favor of respondents upon the ground that the statute supposedly prohibits any judicial review of any sort, at the instance of the employers, of the legality of respondents' actions. The questions presented by the decision of the Court of Appeals and by this petition are these:

1. Consistently with Article III of the Constitution and the nature of the Judicial Power, may all judicial control of any sort be prohibited with respect to administrative action which is contrary to statute and in excess of statutory authority?

2. Consistently with Due Process, may all judicial review of any sort be withheld with respect to administrative action which seriously, substantially and adversely affects the property rights of those who seek such review?

3. In view of the foregoing constitutional questions, and in the light of the settled rule that access to judicial review will be denied only upon the most clear and convincing evidence of legislative intent, can it properly be concluded that Congress intended to prohibit all judicial control whatever over the actions of the Board, even when contrary to statute and in excess of jurisdiction?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional Provisions

Article III of the United States Constitution:

> "Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . ."
>
> "Sec. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [or] the Laws of the United States. . . ."

The Fifth Amendment to the United States Constitution:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Statutes

The pertinent provisions of the Railroad Unemployment Insurance Act (Sections 1(k)(l), 4, and 5)[2] are extensive, and are therefore set forth in Appendix D, pp. 20a-29a, *infra*.

The Arbitration Award

The benefits in question have been paid to men who elected to terminate their employment with the railroads pursuant to the terms of the award of a special arbitration board convened pursuant to Congressional direction. Public Law 88-108, 77 Stat. 132 (1963). The pertinent provisions of the arbitration award are set forth in Appendix E, pp. 30a-31a, *infra*.

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2. Section 1(k)(l) can be found at 52 Stat. 1095 (1938), as amended 54 Stat. 1094 (1940), 60 Stat. 736 (1946), or at 45 U.S.C. § 351(k)(l) (1964); Section 4 at 52 Stat. 1098 (1938), as amended 53 Stat. 846 (1939), 54 Stat. 1097, 1098 (1940), 60 Stat. 737, 738 (1946), 65 Stat. 691 (1951), 72 Stat. 1782 (1958), 73 Stat. 31 (1959), 77 Stat. 222 (1963), or at 45 U.S.C. § 354 (1964); Section 5 at 52 Stat. 1099 (1938), as amended 54 Stat. 1098 (1940), 60 Stat. 738 (1946), 62 Stat. 870, 991 (1948), 63 Stat. 107 (1949), 72 Stat. 948 (1958), or at 45 U.S.C. § 355 (1964). The entire Act is found at 45 U.S.C. §§ 351-404 (1964), as amended 45 U.S.C. §§ 351, 352, 356, 358, 360, 361 & 362 (Supp. II 1965-66).

The Carter Memorandum

The benefits were purportedly authorized by a June 5, 1964 memorandum from Mr. H. L. Carter, then Director of Unemployment and Sickness Insurance of the Railroad Retirement Board, to respondent Regional Directors of the Board. The Carter memorandum appears in Appendix F, pp. 32a-33a, *infra*.

STATEMENT

Petitioners and the class they represent constitute some 775 railroads which contribute more than 85% of all amounts paid into the Railroad Unemployment Insurance Account (R.V. 2, pp. 2-3; R.V. 4, p. 188), a fund established under Section 10 of the Railroad Unemployment Insurance Act[3] for the payment of unemployment benefits to railroad employees. Respondents are members and officials of the Railroad Retirement Board, which is charged, under the provisions of the Act, with the determination of eligibility for unemployment benefits and the payment of such benefits to claimants found to be qualified. Sections 2-5.[4] Respondents have been paying unemployment benefits to more than three thousand former railroad firemen who elected, pursuant to the award of a special arbitration panel established by Congress (Appendix E, pp. 30a-31a, *infra*), to terminate their employment with the railroads in return for substantial severance allowances (R.V. 2, pp. 15-16). Petitioners seek, in this action, to review the legality of respondents' actions. Petitioners assert that, in paying the challenged benefits, respondents have disregarded, as irrelevant, the express limitations upon eligibility for benefits which are set forth in the Act (Section 4(a-2))[5] and have failed to follow the express

3. 45 U.S.C. § 360 (1964), as amended 45 U.S.C. § 360 (Supp. II 1965-66).

4. 45 U.S.C. §§ 352-355 (1964), as amended 45 U.S.C. § 352 (Supp. II 1965-66).

5. 45 U.S.C. § 354(a)(2) (1964)

statutory requirement (Sections 4(a-2), 5(b))[6] that the Board make findings concerning the applicability of such provisions with respect to all claimants for benefits. (R.V. 2, pp. 16-17). Petitioners seek declaratory and injunctive relief. (R.V. 2, pp. 27-30).

The District Court's jurisdiction was invoked under Sections 1331(a) and 1337 of 28 U.S. Code. (R.V. 2, p. 4).

The Railroad Unemployment Insurance Account

Under the terms of the Act, all contributions to the Railroad Unemployment Insurance Account are made by employers such as petitioners, and none are made by their employees. Section 8.[7] Petitioners have an obvious and substantial interest in preventing unlawful disbursements from the Account. Petitioners' contribution rates are intended to vary in accordance with the balance standing in the Account (Section 8), and it is they and the other employers who must, of necessity, replace any amounts which are disbursed from it. Since 1950, the balance standing in the Account has diminished from a surplus of approximately $780,000,000 to a deficit of approximately $250,000,000[8] while the employers' maximum rate of contribution has increased, by degrees, from an original rate of ½ of 1% to a present all-time high of 4%. Section 8(a); 20 C.F.R. § 345.2(a) (1967).

The Elections Made Pursuant to the Award and the Subsequent Applications for Benefits

The arbitration award provided for the elimination of a portion of the firemen positions on non-steam freight and yard engine crews, subject to certain described rights which were afforded

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6. 45 U.S.C. §§ 354(a)(2) & 355(b) (1964).

7. 45 U.S.C. § 358 (1964), as amended 45 U.S.C. § 358 (Supp. II 1965-66).

8. *Railway Express Agency, Inc. v. Kennedy,* 189 F.2d 801, 805 (7th Cir. 1951), *cert. denied,* 342 U.S. 830 (1951); Railroad Retirement Board, *The Monthly Review,* Vol. 27, No. 10 (Oct. 1966).

to men affected by such changes. (R.V. 2, pp. 31g, 31i-k). The rights of the men presently involved are set forth in paragraph C(6) of the Award. (Appendix E, pp. 30a-31a, *infra*). These "C(6) firemen" were to retain all of their rights to engine service assignments unless and until

> "offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become qualified."

The offer of the "comparable job" was to include relocation expenses, accumulated seniority rights for purposes of vacations and other fringe benefits, and guaranteed annual earnings for a period of five years. If any man rejected a comparable job, the award provided that he should "[f]orfeit all of his employment and seniority rights and relations" and receive, in lieu thereof, a severance allowance based upon recent earnings. (Appendix E, pp. 30a-31a, *infra*). With respect to the average C(6) firemen, the severance allowance came to something in excess of $5,600. (R.V. 2, p. 9).

Subsequent to the issuance of the Award, more than 3200 of the C(6) firemen chose to terminate their employment with the railroads and they received, collectively, in excess of $17,000,000 as severance allowances. (R.V. 4, p. 190; R.V. 2, p. 9). Most of these men had been offered, and had rejected, comparable jobs under the terms of the Award; but some had resigned even before comparable jobs had become available or their existing assignments had been affected by the Award. (R.V. 2, p. 16). Following their receipt of the severance allowances, the majority of the C(6) firemen—more than 3,000 of them, in fact—applied for and received unemployment benefits paid by respondents from the Account. (R.V. 2, pp. 10-12, 16-18, 20-21). Such benefits have come to more than $2,500,000. (R.V. 2, p. 18; R.V. 4, pp. 199-200, 228).

The Statutory Provisions Relating to Eligibility

The Railroad Unemployment Insurance Act contains express "Disqualifying Conditions" relating to men, such as the C(6) firemen, who are unemployed through their own choice, and it requires findings by the Board concerning the applicability of those conditions with respect to all claimants for benefits. (Sections 4, 5(b)). The critical language concerning disqualification is found in Section 4(a-2) (Appendix D, pp. 21a-23a, *infra*), which provides in relevant part:

> "(a-2) There shall not be considered as a day of unemployment, with respect to any employee—
>
> "(i) (A) subject to the provisions of subdivision (B) hereof, *any of the days in the period beginning with the day with respect to which the Board finds that he left work voluntarily,* and continuing until he has been paid compensation of not less than $750 with respect to time after the beginning of such period;
>
> "(B) *if the Board finds that he left work voluntarily with good cause, the provisions of subdivision (A) shall not apply . . . .*
>
> "(ii) *any of the thirty days beginning with the day with respect to which the Board finds that he failed, without good cause, to accept suitable work available on such day and offered to him,* or to comply with instructions from the Board requiring him to apply for suitable work or to report, in person or by mail as the Board may require, to an employment office." (Emphasis added.)

Thus, under the terms of the Act, a man is disqualified to receive benefits if the Board finds that "he left work voluntarily," unless it also finds that he "left work voluntarily with good cause." And even if there is a finding that a man left work voluntarily, but with good cause, he is nevertheless disqualified for a 30 day period if the Board finds that "he failed, without good cause, to accept suitable work available . . . and offered to him." As is

implicit in the language of Section 4(a-2), the Board has the duty, in each case, of determining the eligibility of an applicant for benefits as a condition of the payment of such benefits to him. Section 5(b) of the Act eliminates any possible doubt concerning the matter:[9]

> "The Board is *authorized and directed* to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits." (Appendix D, p. 24a, *infra*). (Emphasis added).

The Actions of Respondents

It is admitted that respondents made no effort whatever to determine, upon the basis of the individual circumstances, whether all or any of the C(6) firemen were disqualified for benefits—that is to say, whether, in a given case, the decision to terminate employment with the railroad was made "with good cause," whether the particular comparable job which was offered constituted "suitable work" and, if so, whether it was rejected "without good cause." (R.V. 2, pp. 10-12, 16-17, 91-92; R.V. 4, pp. 199-200).

Instead, and on June 5, 1964, Mr. H. L. Carter—an employee and not a member of the Board—issued a memorandum to respondent Regional Directors which purported to dispense with the problem. (R.V. 2, pp. 31w-x; Appendix F. pp. 32a-33a, *infra*). The memorandum concluded, without discussion or analysis, that

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9. The Court of Appeals found it "unnecessary to decide whether, as the Board contends, Section 355(b) [Section 5(b) of the Act] authorizes but does not require findings . . ." in connection with applications for benefits (Appendix A, p. 6a, note 4); but the question is no longer open for decision. In *Shields v. Utah Idaho Central R.R. Co.*, 305 U.S. 177, 179, 182 (1938), this Court construed identical language contained in the Railway Labor Act and held that where, as in Section 5(b) of the present statute, an agency was "authorized and directed" to take certain described actions, those actions were mandatory. Indeed, the point seems obvious.

neither the choice of separation from railroad service, nor the rejection of the comparable job, nor the acceptance of the severance allowance could have any effect whatever upon the eligibility of any of the C(6) firemen for unemployment benefits. Upon receipt of this memorandum, and without themselves exploring the eligibility of any of the respective claimants, respondent Regional Directors commenced the payment of the challenged benefits. (R.V. 2, p. 18; R.V. 4, pp. 199-200, 228).[10]

The Proceedings Below

The railroads objected promptly and repeatedly to the Board's refusal to follow the statute. (R.V. 2, pp. 18-19). When such objections proved unavailing, petitioners commenced the present action in the United States District Court for the Northern District of California. (R.V. 2, pp. 1-31a-i).

Petitioners moved for preliminary injunctive relief (R.V. 2, p. 37; R.V. 4, p. 203), and respondents moved to dismiss, or, alternatively, for summary judgment. (R.V. 4, p. 156). The District Court denied injunctive relief and granted respondents' motion for summary judgment. The District Court did not undertake to decide whether respondents had acted in accordance with the statute. Instead, the court concluded, upon jurisdictional and pro-

10. The Court of Appeals appears to have misconceived the whole thrust of petitioners' argument, believing petitioners to contend that the Board must make specific, formal findings on a "claim-by-claim basis," even when blanket findings might properly apply to a large class of applicants. (Appendix A, pp. 4a-6a, *infra*). On the contrary, however, and as petitioners have said repeatedly in their briefs, they contend no more than this: that where, as here, the circumstances of the individual claimants are, in fact, dispositive of eligibility, the Board *must* explore those individual circumstances. (Opening Brief, pp. 20-21; Reply Brief, pp. 2-3; Petition for Rehearing, p. 2). This is not to say that, even in the present case, blanket findings on some issues might not have been proper—as for example that, subject to the limitations of Subsections 4(c-d), jobs offered as firemen or as engineers would constitute suitable work and jobs as, say, janitors might not. Though distinctions such as these lie at the heart of the letter and spirit of the statute, the Carter memorandum purported to make them irrelevant.

cedural grounds, that this action could not be maintained by petitioners.[11] (Appendices B, C, pp. 12a-19a, *infra*).

Timely appeals were taken by petitioners from the orders and judgment of the District Court (R.V. 2, p. 148; R.V. 4, p. 255) and were consolidated for hearing in the Court of Appeals. The Court of Appeals affirmed upon the ground that, in its view, Section 5 of the Railroad Unemployment Insurance Act (Appendix D, pp. 23a-29a, *infra*) expressly prohibits judicial review, at the instance of the employers, of decisions of the Board granting claims for benefits. (Appendix A, pp. 6a-11a, *infra*).[12] The Court of Appeals did not discuss—or even mention—the constitutional difficulties which were obviously presented by such an interpretation of the statute.[13]

Petitioners filed a timely petition for a rehearing en banc, requesting that the Court of Appeals at least confront directly the constitutional implications of its decision. The petition was denied without opinion on October 25, 1967. (R.V. 1).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is based squarely upon the conclusion that the statute expressly forbids any judicial review whatever by petitioners of the actions of the Board.[14] It is important to be quite clear concerning what, in present circum-

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11. Though its opinions are not entirely clear upon the matter, the District Court apparently concluded that the Board's actions were ones involving "discretion" and therefore not subject to review; that petitioners had no standing to sue; and that the statute precluded review.

12. The meaning and effect of Section 5 with respect to judicial review are considered in Part III of petitioners' argument concerning Reasons for Granting the Writ.

13. The constitutional problems had earlier been brought to the attention of the Court of Appeals by way of petitioners' opening brief. (pp. 55-56).

14. The Court of Appeals did not discuss, and presumably rejected, the ragbag of makeweight arguments put forward by respondents below as

stances, this decision necessarily means. Petitioners do not merely charge that the Board has made a mistake; it is rather their contention that the Board has failed to heed the express limitations of its governing statute and the procedures which it commands. Petitioners' opportunity for judicial review has not simply been delayed until a later time, or merely restricted in scope; if the decision below stands, the railroads can never be heard before

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to why petitioners were supposedly not entitled to a hearing on the merits. (see, *e.g.*, R.V. 2, pp. 97, 111-130; R.V. 4, pp. 156-57).

There was good reason for rejecting such suggestions. Thus, the proposition that an action such as this, for a declaration that Federal officers have acted in excess of their authority, constitutes an unconsented suit against the United States was recently characterized by Judge Friendly as "surprising" and drew from him the following admonition:

> "[L]aw officers of the Government ought not to take the time of busy judges or of opposing parties by advancing an argument so plainly foreclosed by Supreme Court decisions." *Toilet Goods Association v. Gardner*, 360 F.2d 677, 683 and note 6 (2d Cir. 1966), *affirmed*, 387 U.S. 158, 167 (1967).

Respondents' argument that the C(6) firemen are indispensable parties ignores the fact that all that petitioners ask is that the Board be compelled to follow the procedures commanded by the statute. Plainly, the firemen are not indispensable to such a proceeding. See *Reich v. Webb*, 336 F.2d 153 (9th Cir. 1964), *cert. denied*, 380 U.S. 915 (1965). Moreover, since there is no court in which jurisdiction over all of the firemen could be obtained, a conclusion of indispensability would necessarily deny petitioners any relief whatever, in contravention of the decisions of this Court (*e.g.*, *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65 (1936)) and the provisions of FRCP Rule 19(b).

Respondents' insistence that the doctrine of limited review of acts of administrative discretion precludes the Federal courts from interpreting an act of Congress and from determining whether Federal officials have exceeded their statutory powers is answered by numerous decisions of this Court, of which *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), is perhaps the most closely in point, and of which *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), is the most recent.

Respondents' contention that the railroads, who almost alone contribute to the Account, have no standing to challenge its unlawful waste is based upon a false analogy to *Massachusetts v. Melon*, 262 U.S. 447 (1923), which held that general federal taxpayers had no standing to challenge expenditures of the general federal revenues because their interests were "minute and indeterminable." (262 U.S. at 487). That rule is obviously inapplicable where, as here, petitioners are members of a small and definite class who contribute to a specific fund earmarked for a definite purpose. The decision of this Court in *Stark v. Wickard*, 321 U.S. 288 (1944) is directly in point.

any court at any time or place concerning the waste by the Board of millions from a fund to which they, almost alone, contribute. Moreover, if petitioners cannot seek judicial control of the actions of the Board, neither can anyone else; and the decision of the Court of Appeals therefore means that no court, anywhere, can ever restrain the Board from defying the statute creating its power to act.

Petitioners submit that such a wholesale denial of judicial review is contrary to Article III of the Constitution and to the Due Process clause of the Fifth Amendment and that it conflicts with numerous decisions of this Court which have interpreted and applied those constitutional provisions. Only action by this Court now can prevent a major dilution of the Judicial Power and the final obliteration of a constitutional right.

In interpreting the statute to prohibit all review—an interpretation which clearly was not compelled by the language of the Act—the Court of Appeals necessarily raised, and even decided, these constitutional questions; yet it reached its conclusion without even acknowledging that the constitutional questions existed. Plainly, therefore, the Court of Appeals could not have heeded the decisions of this Court which warn against interpreting statutes in ways creating doubts concerning their constitutionality. Neither could it have followed the numerous decisions of this Court which uniformly refuse to attribute to Congress an intent to prohibit judicial restraint of administrative acts in excess of statutory power. Such departures from the accepted and usual course of judicial proceedings call for the exercise of this Court's power of supervision.

I

In denying all judicial control whatever of actions of Government officials proceeding in excess of their statutory authority, the decision of the Court of Appeals conflicts with Article III of the

Constitution and with the rationale and necessary implications of numerous decisions of this Court.

There is, of course, no doubt that Congress may submit questions of law and fact, otherwise judicially cognizable, for executive or administrative decision and that, with some exceptions, it may restrict the scope of review of such decisions, or defer review until a later stage of the proceedings. What Congress cannot do, consistently with the Constitution, is to make the administrator the final arbiter of the limits of his own statutory powers; for that is a judicial function vested in the courts by Article III, which can be obliterated by neither the executive nor the legislative branches of the Government.

That this is so has been implicit since the earliest decisions of this Court. Consider *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), where the Court, in discussing Marbury's right to his commission, observed that Madison was "amenable to the laws for his conduct" (5 U.S. at 166), and that, since the whole of the Judicial Power of the United States was vested by Article III in the Federal courts, and since that power extended to all cases arising under the laws of the United States, the Constitution required that jurisdiction "in some form" should exist over the controversy. (5 U.S. at 173-174). To be sure, there was, in *Marbury v. Madison,* no question as to the effect of an attempt by Congress to limit the Judicial Power; but the rationale of the decision, based squarely upon Article III, hardly admits of such an exception. The argument was further advanced in *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304 (1816), where Justice Story, speaking for the Court, reasoned that, pursuant to Article III, the *whole* of the Judicial Power must be vested by Congress in *some* Federal court; any other construction "might defeat the constitution itself." (14 U.S. at 329-30).

Though subsequent decisions of this Court have upheld statutory restrictions upon the scope, the extent and the timing of judicial review of administrative action, petitioners are aware of

no occasion upon which this Court has approved a legislative prohibition of all review whatever of administrative action in excess of statutory power. On the contrary, a number of decisions of the Court strongly imply that such a prohibition would offend Article III. Thus, in *Stark v. Wickard,* 321 U.S. 288 (1944), the Court observed that the powers of agencies were "circumscribed by the authority granted," that the "responsibility of determining the limits of statutory grants of authority in such instances is a judicial function" (321 U.S. at 309-10) and that litigation to determine such matters could be maintained "in the ordinary courts in the absence of some exclusive alternative remedy." (321 U.S. at 290). *Accord, United States v. ICC,* 337 U.S. 426, 433-34 (1949); see also *Bowles v. Willingham,* 321 U.S. 503, 511-12 (1944).

In *Crowell v. Benson,* 285 U.S. 22 (1932), the Court approved the submission of matters of ordinary fact and of law for administrative determination, but remarked that "reservation of full authority to the courts to deal with matters of law provides for the appropriate exercise of the judicial function" and that the activities of administrative agencies would relieve the court "of a most serious burden while preserving their complete authority to ensure the proper application of the law." (285 U.S. at 54)[15] Consider also *Schilling v. Rogers,* 363 U.S. 666 (1960), where the Court, in holding that judicial review of a particular administrative decision was prohibited by the statute, noted, by way of explanation

> "This is not a case in which it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope

15. As Professor Jaffee has observed, this statement "would seem fairly to support the doctrine that though an administrative agency may be empowered to adjudicate, the validity of its determinations in point of law must be open to judicial scrutiny." Jaffe, *Judicial Control of Administrative Action,* at 382 (Little, Brown and Company, 1965).

> of his powers, where the availability of judicial review would be attended by quite different considerations than those controlling here." (363 U.S. at 676-77).

The rationale of such cases is strongly supported by numerous decisions of this Court which strike down unauthorized administrative actions despite the assumption that, had they been within the scope of the statute, the actions would have been final. Thus, in *School of Magnetic Healing v. McAnnulty,* 187 U.S. 94 (1902), the Court conceded the "conclusive" character of the determination by the Postmaster General of all questions of fact, but held his decisions to be reviewable where he had "exercised jurisdiction in a case not covered by the statutes." (187 U.S. at 107-08). In *Estep v. United States,* 327 U.S. 114 (1946), the statute provided that the agency's decision should be "final." After noting that, in some circumstances, "judicial review may indeed be required by the Constitution" (327 U.S. at 120), the Court held that the statutory provision for finality would not be given the effect of precluding review of jurisdictional questions. (327 U.S. at 122-23). *Accord, Harmon v. Brucker,* 355 U.S. 579 (1958) (discussed in detail at pp. 20-21, *infra*).

The heart of the matter is this: as to agency action which is in excess of statutory power, the function of the courts is not that of judicial review, but, rather, of judicial control. See *Leedom v. Kyne,* 358 U.S. 184, 188 (1958), where this Court so held:

> "This suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act."

Petitioners submit that the power and the duty of the courts to keep the administrator within the bounds of the statute are created and safeguarded by Article III of the Constitution and that, even if Congress wished to do so, it would be without power to abolish them.

II

The denial by the Court of Appeals of any judicial review whatever, at any time or place, clearly deprives appellants of Due Process of Law.

This is not a case where judicial review has merely been deferred or restricted in scope. It is a case where, unless this Court acts, appellants cannot be heard before any court at any time. Yet, where, as here, serious and substantial interests are affected adversely by administrative action, a right to judicial review *at some time* is compelled by the Constitution. The most recent formulation of the rule was that of Mr. Justice Fortas (joined by the Chief Justice and Mr. Justice Clark) in his dissent in *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967), and the related cases:

> "[F]undamental principles of our jurisprudence insist that there must be some type of effective judicial review of final, substantive agency action which seriously affects personal or property rights." (387 U.S. at 177).[16]

As the authorities adduced by Justice Fortas demonstrate, the doctrine which he declared was firmly rooted in earlier decisions of this Court. The concurring opinion of Mr. Justice Brandeis in *St. Joseph Stockyards Co. v. United States,* 298 U.S. 38, 84 (1936), is perhaps the most celebrated statement of the rule; but there are others. See, for example, *Phillips v. Commissioner,* 283 U.S. 589, 596-97 (1931), and *Ewing v. Mytinger & Casselberry,* 339 U.S. 594, 599 (1950), two majority opinions in which this Court recognized that Due Process required a judicial hearing at some stage of the proceedings, but found, upon the facts and statutes there involved, that the proper time had not yet come. *Accord, Bowles*

16. Though the Justices were dissenting, in part, from decisions of the majority, there is nothing in the majority opinions to suggest disagreement upon this point. On the contrary, the difference between the majority and dissenting Justices was not over whether the Constitution required judicial review at some time, but rather over the stage in the proceedings at which Congress had intended that such review should take place. See 387 U.S. at 177 and note 2; 184 and note 11; 185; 188 and note 14.

v. Willingham, 321 U.S. 503, 520-21 (1944); *Yakus v. United States,* 321 U.S. 414, 442-44 (1944). For petitioners, of course, there is no time but now.

There is at least one decision of this Court holding squarely what the other decisions say and necessarily imply: *Chicago, Milwaukee & St. Paul Rwy. Co. v. Minnesota,* 134 U.S. 418 (1890). The Supreme Court of Minnesota had held that, under applicable Minnesota statutes, rates established by the Minnesota Railroad Commission were conclusive and not subject to judicial review. This Court held that, so construed, the statute conflicted with the Constitution of the United States by depriving the railroads of the right to an ultimate judicial investigation guaranteed by Due Process of Law. (134 U.S. at 456-57). So is it with petitioners.

To be sure, there are cases which say, and sometimes hold, that, consistently with the Constitution, judicial review may be withheld by Congress in particular circumstances; but it is the circumstances which account for the decisions. Thus, judicial review may usually be withheld at one stage of the proceedings if it may be had at a later time. See, *e.g., Ewing v. Mytinger & Casselberry,* 339 U.S. 594 (1950). Again, when what is involved is not affirmative Government action, of which the citizen feels the bite, but rather a failure by the Government to grant to him a benefit, judicial review may sometimes be withheld altogether, if evidence of Congressional intent seems clear enough. See, *e.g., Dismuke v. United States,* 297 U.S. 167 (1936).[17]

Professor Davis reconciles the cases by arranging them upon a scale running from benefit to burden, and concludes that

> "not a single case upholding unreviewability is an entirely satisfactory authority in support of the idea that due process permits denial of review of questions of law, procedure and

17. Such a case also is *Switchmen's Union v. Board,* 320 U.S. 297 (1943), where the right of the union to representation was dealt with as a Governmental benefit as to which judicial review might constitutionally be withheld. (320 U.S. at 297). *But see Leedom v. Kyne,* 358 U.S. 184 (1958).

substantial evidence when the party seeking review is resisting enforcement of a legal obligation." 4 Davis, *Administrative Law Treatise,* Section 28.19, at 106.

Professor Jaffee agrees,[18] and so do the cases. There is no doubt that petitioners fall at the "burden" end of the scale, or that, in the rather more direct language of Mr. Justice Fortas, the conduct of respondents "seriously affects [petitioners'] property rights." (387 U.S. at 177). After all, what petitioners challenge is the unlawful waste by respondents of millions from a fund to which the railroads, almost alone, are compelled by statute to contribute. Due Process of Law requires that, at some time or place, petitioners be afforded a hearing before a court. The last possible occasion for such a hearing is here and now.

III

In construing the statute to prohibit all judicial review whatever of the Board's decisions, the Court of Appeals contravened two fundamental rules of statutory construction which have been repeatedly emphasized and applied by this Court. The first is that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Panama Railroad Co. v. Johnson,* 264 U.S. 375, 390 (1924). The second is that the court will interpret a statute as restricting access to judicial review only upon a showing of the most "clear and convincing evidence" of such a legislative intent (*Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-41 (1967)), and that, where as here, review is sought of acts in excess of agency power, such an intent cannot and will not be attributed to Congress (*United States v. ICC,* 337 U.S. 426, 434 (1948)).

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18. Jaffee, *Judicial Control of Administrative Action,* at 386-87 (Little, Brown and Company, 1965).

The constitutional implications of the decision of the Court of Appeals have already been considered. It is sufficient, for present purposes, to observe that they are, without doubt, both serious and substantial. It can hardly be suggested that the Court of Appeals gave sufficient attention to the constitutional difficulties which were engendered by its decision; for they were not even mentioned anywhere in the opinion.

Neither did the Court of Appeals follow the numerous decisions of this Court which unanimously refuse to find an intent to prohibit judicial control over agency actions which, like that of the Board, are "in excess of . . . . delegated powers and contrary to a specific prohibition in the Act." *Leedom v. Kyne,* 358 U.S. 184, 188 (1958); *Harmon v. Brucker,* 355 U.S. 579 (1958); *United States v. ICC,* 337 U.S. 426, 434 (1948); *Estep v. United States,* 327 U.S. 114 (1946); *Stark v. Wickard,* 321 U.S. 288, 309-10 (1944).

Harmon v. Brucker is particularly illustrative. The statutes there provided that the administrative determination should be "*final,* subject only to review by the Secretary of the Army" (355 U.S. at 581) and "final and conclusive . . . except when procured by means of fraud." (355 U.S. at 585). This Court, in a *per curiam* decision, expressly took note of these provisions and of the Secretary's argument that they deprived the Federal courts of jurisdiction to review his findings. The Court, however, concluded that such provisions could have no effect if the Secretary had in fact "acted in excess of the powers granted him by Congress," for in such circumstances, "judicial review from this illegality would be available." (355 U.S. at 581-82). The Court went on to hold that the actions of the Secretary could not be sustained under the statute.

Harmon v. Brucker admits of only two possible interpretations. Either the Court concluded, as petitioners have argued, that judicial restraints may not constitutionally be withheld with respect to

administrative actions which are in excess of statutory power; or it ruled that an intent to preclude judicial control over such actions would not be attributed to Congress whatever the statute might otherwise provide with respect to actions fairly within the limits of the powers granted.[19] In either event, the decision compels the conclusion that the Court of Appeals was wrong in assuming that the Railroad Unemployment Insurance Act prohibits review of the actions of respondents.

An examination of the statute itself strongly reinforces that conclusion. The only provisions of the Act which relate to judicial review are found in Section 5, which provides a particular procedure for administrative and judicial review in particular and selected circumstances not presently applicable. Thus, where an employee is *denied* a claim for benefits (or where an employer denies the fact of employment), the Act provides in Subsection 5(c) for an administrative appeal, and in Subsection 5(f) for judicial review in the Courts of Appeals. But nothing specific is said concerning review proceedings, either administrative or judicial, where as, here, claims for benefits have been *granted*. Of course, the fact that some administrative decisions are expressly made reviewable in a particular fashion neither compels nor suggests the conclusion that Congress intended to prohibit review of other actions as to which no review is expressly provided. This Court so held most recently in *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967).

The Court of Appeals conceded that there "might be merit" in petitioners' argument that Subsections 5(c) and 5(f) did not affect their right to judicial review, but went on to conclude that Subsection 5(g) of the Act expressly prohibited such review

19. A different situation might, of course, be presented if a statute *expressly* prohibited judicial review even of actions in excess of the powers granted to the agency. The statute in *Harmon v. Brucker* did not contain such a prohibition and neither does Section 5 of the Railroad Unemployment Insurance Act.

(Appendix A, p. 11a, *infra*).[20] Subsection 5(g) provides, in relevant part:

> "Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, *the determination of any other matter pursuant to subsection (c) of this section,* and [determinations concerning availability of funds] shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes . . . and shall not be subject to review in any manner other than that set forth in subsection (f) of this section." (Emphasis added). (Appendix D, p. 28a, *infra*).

The most that can be said for the position of the Court of Appeals is that the emphasized language contains an ambiguity—one which may, however, be resolved upon analysis. Either "pursuant to subsection (c)" modifies both "claim for benefits" and "any other matter," as the word "other" suggests, or it modifies only "any other matter," with the word "other" being superfluous. If the former interpretation is given, so that all words in the statute may be accorded meaning, then Subsection 5(g) refers only to claims which are *denied,* and are therefore appealable under Subsection 5(c), and not to claims which are *allowed,* with which Subsection 5(c) has nothing to do.

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20. The Court of Appeals relied, in this connection, upon *Railway Express Agency, Inc. v. Kennedy,* 189 F.2d 801 (7th Cir. 1951), *cert. denied,* 342 U.S. 830 (1951), which construed the same statute. Though the Court in *Kennedy* did conclude that Section 5 of the Act precluded review of the Board actions there in issue, the *Kennedy* decision affords but slender support for the present one. For one thing, the Court in *Kennedy* apparently thought that, since the statute expressly provided for judicial review of some Board actions, it impliedly prohibited review of all others. (189 F.2d at 804). *Abbott Laboratories v. Gardner,* however, is directly to the contrary. Moreover, in *Kennedy,* both the District Court (95 F.Supp. at 788) and the Court of Appeals clearly assumed that the Board had in fact performed its statutory duty to make findings relating to eligibility, and there was, therefore, no question concerning what intention should be attributed to Congress with respect to actions contrary to the procedures required by the statute.

The former interpretation is wholly consistent with the rest of Section 5, while that of the Court of Appeals is not. In Subsections 5(c) and 5(f), Congress has plainly established a special system for determining the issues specified in Subsection 5(c). Congress created no constitutional difficulties by making that special system exclusive as to matters to which it relates; the system expressly provides for judicial review in Subsection 5(f). It seems quite probable that Congress enacted Subsection 5(g) simply for the purpose of continuing and completing the scheme provided in Subsections 5(c) and 5(f)—rather than for the purpose of frustrating judicial review of other matters not included within that special system. Indeed, unless Subsection (g) is so construed, it is apparent that all of its provisions cannot be read in *pari materia;* for finality under Subsection (g) is expressly made subject to the judicial review provided in Subsection (f), which relates *only* to matters determinable under Subsection (c). How can Board actions which are *not* reviewable under Subsection (f) be made final subject *only* to review under Subsection (f)?

Thus, upon consideration of the statute as a whole, the ambiguity which misled the Court of Appeals disappears. Yet, even if the statute could be interpreted literally in more than one way, the construction chosen by the Court of Appeals still could not be supported; for the decisions of this Court would then require the choice of that construction which would leave intact the right to judicial review and would avoid the grave doubts concerning the constitutionality of the statute which otherwise would necessarily arise.

Moreover, the Court of Appeals failed to note that, however Subsection (g) is construed, and whatever bearing it might have upon review of Board actions in other circumstances, it still could not affect review of the matters presently in issue. For, in giving finality to "findings" and to "conclusions," under Subsection (g), Congress obviously could have intended to bestow its blessings only upon such findings and conclusions as were in fact made by the Board—and not upon the Board's failure to

make the findings and conclusions which the statute required. Yet, in the present case, it is the very absence of the statutory findings of which appellants complain. The subsection, therefore, is necessarily inapplicable.[21]

Finally, the Court of Appeals failed to give adequate attention to the nature of the actions of which petitioners complain. Petitioners' charge is that respondents have contravened the express limitations of the statute and refused to follow the procedures which it commands. The decisions of this Court make it unmistakably clear than an intention to prohibit judicial restraint of such actions will not be attributed to Congress, whatever Congress might be thought to have intended with respect to other acts fairly within the powers granted to the administrator. Indeed, *Harmon v. Brucker* is directly in point, as are *Leedom v. Kyne, United States v. ICC,* and *Stark v. Wickard.* See also *Siegel v. United States,* 87 F. Supp. 555 (E.D.N.Y. 1949), where the argument is developed at somewhat greater length.

In short, the statute does not compel the construction which the Court of Appeals has put upon it, and the decisions of this Court do not permit it.

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21. Respondents have argued, and the Court of Appeals may have believed (Appendix A, pp. 5a-6a, *infra*) that the filing of the claims and their certification for payment pursuant to the directions in the Carter memorandum might, perhaps, constitute the findings required by the statute. Such certifications might, indeed, have constituted findings as to some matters—as, for example, that the claims in question had been filed by C(6) firemen. But they obviously could not have constituted the findings required by Section 4(a-2) upon those matters which the Carter memorandum expressly made immaterial: whether leaving of work was "with good cause"; whether the comparable jobs constituted "suitable work"; and whether such work was rejected "without good cause." It is undisputed that, upon these subjects, no findings were ever made. It is, of course, settled that when an agency is required by statute to make findings upon several matters, findings as to less than all such matters cannot support the agency's determination. See *Yonkers v. United States,* 320 U.S. 685 (1944); *Wichita R.R. v. PUC,* 260 U.S. 48 (1922).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BURNHAM ENERSEN
601 California Street
San Francisco, California 94108

RICHARD MURRAY
601 California Street
San Francisco, California 94108

Attorneys for Petitioners

Of Counsel

McCUTCHEN, DOYLE, BROWN & ENERSEN
601 California Street
San Francisco, California 94108

Dated: January 10, 1968

(Appendices Follow)

Appendix A

Opinion of the Court of Appeals

United States Court of Appeals
for the Ninth Circuit

Nos. 20,785 and 21,377

Western Pacific Railroad Company and The Southern Pacific Company, suing on their own behalf and on behalf of all other railroads similarly situated,

Appellants,

vs.

Howard K. Habermeyer, Thomas M. Healy and A. E. Lyon, individually and as members of the Railroad Retirement Board, et al.,

Appellees.

[August 23, 1967]

Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: POPE, HAMLEY and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

Appellants are two of the railroads that are "employers" as defined in the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-367, as amended, particularly §351(a). They purport to sue, under Rule 23(a), F.R.Civ.P., on behalf of themselves and over 775 other railroads similarly situated.[1] Appellees are the

[1]We do not decide whether this is a proper case for such a class action.

members of the Railroad Retirement Board, which administers the Act, the Director of its Bureau of Unemployment and Sickness Insurance, the Chief of its Division of Claims Operations, and its seven regional directors. There are two appeals, one from an order denying a motion for a preliminary injunction, the other from a summary judgment dismissing the action. The dismissal was based on essentially the same reasoning used in denying the motion. See *Western Pacific Railroad Co. v. Habermeyer*, N.D. Cal. S.D., 1965, 248 F. Supp. 44. We affirm.

The controversy relates to the payment of unemployment benefits to certain railroad firemen, referred to in the record as "C(6) firemen." It arises in this way: In August, 1963, Congress took note of the long standing dispute between the railroads and the firemen relating to the railroads' desire to eliminate many firemen's jobs, and provided for the setting up of a special arbitration board to settle the matter. Pub. L. 88-108, 77 Stat. 132. On November 25, 1963, the arbitration board handed down its award. This provided for the elimination of certain jobs. Paragraph C(6) of the award covered firemen whose jobs were to be eliminated and who had more than two but less than ten years' seniority. They were to retain their rights to engine service assignments, "unless and until offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become, qualified." If, when such a job was offered, it was not accepted, then the fireman's "employment and seniority rights" were to be terminated and the fireman was to be entitled to a severance allowance, estimated by appellants to average in excess of $5,600. Appellants allege that over 3,000 C(6) firemen elected not to take the comparable job, but took the severance allowance. Most of them also applied for unemployment benefits under the Act.

Appellants do not in this proceeding seek review of a decision that a particular C(6) fireman is entitled to benefits. What they attack is the validity of a ruling of the Board's then Director of Unemployment and Sickness Insurance, Carter, issued on June 5, 1964, and addressed to the Board's Regional Directors. The Carter memorandum instructed them, in substance, that a C(6) fireman's choice of having his service terminated, with a severance allowance, does not disqualify him for unemployment benefits under the Act. The ruling says that such a fireman, making such a choice, is not to be regarded as having voluntarily left work without good cause within the meaning of section 354(a-2)(i) or as having failed to accept suitable work without good cause within the meaning of section 354(a-2) (ii) of the Act.[2] These views have been informally approved by the Board. Appellants seek an injunction prohibiting the payment of benefits to any C(6) fireman who terminated his employment under the arbitration award and a declaration that the Carter memorandum is in violation of the Act, that the Board's procedure in deciding the cases of C(6) firemen is in violation of sections 354(a-2) and 355(b) of the Act, that every C(6) fireman who terminated his employment left work voluntarily, that in the case of each, the Board must determine whether the leaving was with good cause, that as to each the Board must determine whether the comparable

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[2] "(a-2) There shall not be considered as a day of unemployment, with respect to any employee—

(i) (A) subject to the provisions of subdivision (B) hereof, any of the days in the period beginning with the day with respect to which the Board finds that he left work voluntarily, and continuing until he has been paid compensation of not less than $750 with respect to time after the beginning of such period;

(B) if the Board finds that he left work voluntarily with good cause, the provisions of subdivision (A) shall not apply . . . ."

"(ii) any of the thirty days beginning with the day with respect to which the Board finds that he failed, without good cause, to accept suitable work available on such day and offered to him, or to comply with instructions from the Board requiring him to apply for suitable work or to report, in person or by mail as the Board may require, to an employment office."

job offered was suitable work and, if so, whether he failed, without good cause, to accept it, and that all payments made without such determinations are unlawful.[3]

Appellants argue that section 354(a-2) implicitly and section 355(b) explicitly command the Board to make specific findings of fact and conclusions of law on a claim by claim basis and that the blanket ruling of the Carter memorandum is in violation of these provisions. Section 355(b) reads:

> "The Board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits. The Board is further authorized to hold such hearings, to conduct such investigations and other proceedings, and to establish, by regulations or otherwise, such procedures as it may deem necessary or proper for the determination of a right to benefits."

This contention must be considered in perspective, in the light of the nature of the duty that the Board must perform in administering the Act.

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[3]Appellants allege:

"that in each of said cases said Regional Director Defendants, and their agents or employees, acting pursuant to the terms and implicit directions of the aforesaid 'Carter memorandum' and based upon a set of facts common in every respect to and applicable in the case of each such C(6) fireman found that no such C(6) fireman 'left work voluntarily' and failed to undertake to make or make, based upon the facts and circumstances pertaining to a particular claimant, any findings whatsoever concerning:

(a) The disqualification of the claimant under said Section 4(a-2) of said Act to receive said benefits.

(b) Whether the claimant's leaving of work had been 'with good cause.'

(c) Whether, with respect to the claimant who was found to have left work voluntarily 'with good cause' or not to have left work 'voluntarily,' the comparable job offered him, pursuant to Award 282, constituted 'suitable work' for the claimant, and, if so, whether, simultaneously with leaving work, such claimant had 'failed, without good cause, to accept suitable work.' "

The receiving, processing and granting or denying of claims for benefits is a wholesale business. In 1964-65, there were 111,000 railroad workers who claimed and were paid benefits. Congress evidently knew that there would be this type of business for the Board. In section 362(f), it authorized the Board to delegate its powers. In section 362(i), procedure is established for the setting up of employment offices and the registration of unemployed workers. It provides:

> "The Board may, when such registration is made personally by an employee, accept such registration as initial proof of unemployment sufficient to certify for payment a claim for benefits."

The Board has set up seven Regional Offices and ninety District Offices. There is a large number of unemployment claims agents designated by the railroads, with whom employees may register. Registration is by filling out a form of application for unemployment benefits and employment service and a claim for unemployment benefits. The latter must be filed every two weeks. These are forwarded to the District Office, and unless there is reason to doubt the accuracy of the information given, or the claimant's eligibility, the claim is certified for payment. This is, of necessity, the "findings of fact and conclusions of law" that the Board makes in a vast majority of cases. When a large number of employees covered by the Act apply for benefits, and when their unemployment arises from some event that affects them all, it is the practice of those passing upon their claims to call upon the Board's District Office, and of such offices in turn to call upon its Regional Offices, for advice. The latter, in turn, may seek advice from the Division of Adjudication in the Board's Bureau of Unemployment and Sickness Insurance. The Bureau, if in doubt, calls upon the Board's Bureau of Law. It was just such a situation that produced the Carter memorandum, here attacked. In follow-

ing it, the Board and its agents necessarily make findings of fact and apply its conclusions of law in each case, however informal or brief or incorrect appellants may consider such findings and conclusions to be. As a practical matter, we find it difficult to see how else the Board could assure a reasonable degree of uniformity in the application of the Act to benefit claims. The Board's method of finding facts and making conclusions of law may not resemble the method typically used by a court, but we think that the method is in line with the type of administration authorized by the Act.[4]

With regard to appellants' request for a declaration that all C(6) firemen who elect to terminate their employment and accept severance pay in lieu of a comparable job must be considered to have voluntarily left work, we think that this court is without jurisdiction to render an opinion. In *Abbott Laboratories v. Gardner*, 1967, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681, decided May 22, 1967, the Supreme Court was once again called upon to consider the rules as to when a party claiming to be aggrieved is entitled to judicial review of administrative action. As Mr. Justice Harlan states the rule, it is "that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress . . . ." "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." The Administrative Procedure Act makes review available "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." (5 U.S.C. § 701(a)). In *Abbott*, the Court held that judicial review was not precluded by the statute there involved. In this case,

[4]We find it unnecessary to decide whether, as the Board contends, section 355(b) authorizes but does not require findings of fact and conclusions of law each time an applicant applies for benefits.

we are convinced that the statute does preclude the review sought by appellants.

The pertinent provisions of the Act are set out in the margin.[5]

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[5]"§355. Claims for benefits—Publication of Board's regulations.

"(a) Claims for benefits and appeals from determination with respect thereto shall be made in accordance with such regulations as the Board shall prescribe.

. . . .

"(b) The Board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits. The Board is further authorized to hold such hearings, to conduct such investigations and other proceedings, and to establish, by regulations or otherwise, such procedures as it may deem necessary or proper for the determination of a right to benefits.

"(c) Each qualified employee whose claim for benefits has been denied in whole or in part upon an initial determination with respect thereto upon a basis other than one which is reviewable pursuant to one of the succeeding paragraphs of this subsection, shall be granted an opportunity for a fair hearing thereon before a referee or such other reviewing body as the Board may establish or assign thereto.

"Any claimant whose claim for benefits has been denied in an initial determination with respect thereto upon the basis of his not being a qualified employee, and any claimant who contends that under an initial determination of his claim he has been awarded benefits at less than the proper rate, may appeal to the Board for the review of such determination. Thereupon the Board shall review the determination and for such review may designate one of its officers or employees to receive evidence and to report to the Board thereon together with recommendations.

. . . .

"In any case in which benefits are awarded to a claimant in whole or in part upon the basis of pay earned in the service of a person or company found by the Board to be an employer as defined in this chapter but which denies that it is such an employer, such benefits awarded on such basis shall be paid to such claimant subject to a right of recovery of such benefits. The Board shall thereupon designate one of its officers or employees to receive evidence and to report to the Board on whether such benefits should be repaid. The Board may also designate one of its officers or employees to receive evidence and report to the Board whether or not any person or company is entitled to a refund of contributions or should be required to pay contributions under this chapter, regardless of whether or not any claims for benefits will have been filed upon the basis of service in the employ of such person or company, and shall follow such procedure if contributions are assessed and payment is refused or payment is made and a refund claimed upon the basis that such

Subsection (f) of section 355 deals specifically with judicial review. In the case of claims for benefits, it authorizes, first, the review of denials (in whole or in part) at the instance of the

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person or company is or will not have been liable for such contributions.

. . . .

"Final decision of the Board in the cases provided for in the preceding two paragraphs shall be communicated to the claimant and to the other interested parties within fifteen days after it is made. Any properly interested party notified, as hereinabove provided, of his right to participate in the proceedings may obtain a review of any such decision by which he claims to be aggrieved or the determination of any issue therein in the manner provided in subsection (f) of this section with respect to the review of the Board's decisions upon claims for benefits and subject to all provisions of law applicable to the review of such decisions. Subject only to such review, the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish all rights and obligations, arising under this chapter, of every party notified as hereinabove provided of his right to participate in the proceedings.

"Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f) of this section.

"(d) The Board shall prescribe regulations governing the filing of cases with and the decision of cases by reviewing bodies, and the review of such decisions. The Board may provide for intermediate reviews of such decisions by such bodies as the Board may establish or assign thereto. The Board may (i) on its own motion review a decision of an intermediate reviewing body on the basis of the evidence previously submitted in such case, and may direct the taking of additional evidence, or (ii) permit such parties as it finds properly interested in the proceedings to take appeals to the Board. Unless a review or an appeal is had pursuant to this subsection, the decision of an intermediate reviewing body shall, subject to such regulations as the Board may prescribe, be deemed to be the final decision of the Board."

. . . .

"(f) Any claimant, or any railway labor organization organized in accordance with the provisions of the Railway Labor Act, of which claimant is a member, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Court of

claimant or a union representing him, and, second, review of decisions as to whether a person is an "employer," at the instance of that person. If that were all, there might be merit in appellant's contention that, because the Act does not expressly forbid review of the granting of benefits at the instance of an employer, such review must be permitted under the doctrine stated in *Abbott,* supra.

But there is more. Subsection (c) expressly limits review of the Board's decision made under that subsection to the review provided for in subsection (f). This again, standing alone, does not answer appellants. Subsection (g), however, goes further. It provides that [1] "[f]indings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, [2] the determination of any other matter pursuant to subsection (c) of this section, and [3] the determination of the Board that the unexpended funds in the account are available . . . shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section."

Appeals for the Seventh Circuit or in the United States Court of Appeals for the District of Columbia. . . . Upon the filing of such petition the court shall have exclusive jurisdiction of the proceeding and of the question determined therein . . . .

"(g) Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the determination of any other matter pursuant to subsection (c) of this section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this chapter, shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section."

To us, this language clearly precludes review of a decision granting benefits to a C(6) fireman or to any other employee. Appellants' answer is, first, that they are not seeking review of an individual case, that they seek to attack the Board's legal conclusion relative to C(6) firemen independent of the Board's application of the rule to a particular claimant, and that, therefore, subsection (g) can have no bearing on their case. The difficulty with this argument is that the Board's rule can have no effect until it is applied in an individual case, and when it is applied, subsection (g) precludes review. To allow this action would be to subvert Congress' obvious intention to keep review within the framework of subsection (f) and to limit review to that provided by subsection (f). Indeed, it is difficult to imagine how such subversion could be accomplished more efficiently than through such a wholesale attack as the present declaratory judgment action.

Appellants also say that subsection (g) only precludes review of decisions under subsection (c). They argue that the word "other" in the second category of subsection (g) limits the first category of the subsection to determinations of claims for benefits or refunds made within the scope of subsection (c). This interpretation would seem to charge Congress with a substantial redundancy. If the Congressional aim were only to limit review of findings of fact and conclusions of law made within the scope of subsection (c), the direct approach would have been to refer to findings of fact and conclusions of law in the determination of any matter pursuant to subsection (c). But Congress used broader language. Appellants counter that if "other" does not limit the first category of subsection (g) to subsection (c) determinations, then "other" is itself a redundancy. This, however, only follows if (1) findings and conclusions relative to claims are only authorized within the scope of subsection (c) and (2) no other determinations beyond those related to claims and refunds are authorized by subsection (c).

Neither proposition is true. Subsection (b) authorizes findings and conclusions generally with regard to claims, whether the case is reviewable under subsections (c) and (f) or not. And subsection (c) does not allow review of all determinations or by all parties aggrieved. Moreover, a full reading of subsection (c) shows that it authorizes the Board to make determinations as to whether a company should be required to pay contributions, even though no claims based upon service with such company have been filed.

We think a more logical conclusion is that the first category of subsection (g) relates to all determinations relative to claims for benefits or refunds, whether included within the scope of subsection (c) or not. The word "other" merely expands the first category to preclude review of determinations covered by subsection (c) but not related to claims for benefits or refunds. It follows that the last clause of subsection (g) expressly prohibits the review here sought.

What we have said about appellants' attack upon the Carter memorandum is, we think, equally applicable to their claim that the Board must make special findings of fact, as to each C(6) fireman. What appellants are saying, in substance, is that the Board has not made the kind of findings and conclusions that appellants think it should. They are really seeking wholesale review of the Board's findings and conclusions. Such review, whether individual or wholesale, at the instance of employers, is just what the Act in section 355(g) forbids.

In *Railway Express Agency, Inc. v. Kennedy,* 7 Cir., 1951, 189 F.2d 801, the court reached the same conclusion that we have reached as to the meaning and effect of subsection (g), and under quite comparable facts.

Affirmed.

Appendix B

Opinion of the District Court in Case No. 20785

In the United States District Court for the Northern District of California, Southern Division

No. 44304

The Western Pacific Railroad Company, and The Southern Pacific Company, suing on their own behalf and on behalf of all other railroads similarly situated,

Plaintiffs,

vs.

Howard W. Habermeyer, et al.,

Defendants.

MEMORANDUM OF DECISION

SWEIGERT, J.

Plaintiffs, Western Pacific Railroad Company, Southern Pacific Company, suing on their own behalf and on behalf of 775 other similarly situated railroads, have brought this action against defendants, as members and officials of the Railroad Retirement Board (Railroad Retirement Act of 1937, as amended 45 U.S.C. § 228a-228a-I) for a declaratory judgment and for an injunction enjoining defendants from paying any unemployment benefits out of a Railroad Unemployment Insurance Account created by the Railroad Unemployment Insurance Act (45 U.S.C. § 352) to firemen who terminated their railroad employment by accepting severance pay in lieu of other employment as provided in Part C(6) of an Arbitration Award of November 26, 1963, made under an Act of Congress in August of 1963 (Public Law 88-108, 88th Congress).

The case is presently before the Court upon plaintiffs' motion for a preliminary injunction based upon the verified complaint, an affidavit of Burnham Enersen, one of counsel for plaintiffs, and upon plaintiffs' Memorandum of Points and Authorities.

The defendants oppose the motion upon the basis of the pleadings, an affidavit of Lawrence Garland, Secretary of the Railroad Retirement Board, an affidavit of Abraham Niessen, Chief Actuary for the Railroad Retirement Board, a letter dated September 24, 1964, from Myles F. Gibbons, its General Counsel, to the General Counsel of the Association of American Railroads, and upon defendants' Memorandum of Points and Authorities.

Part C(6) of the Arbitration Award provided that certain firemen, who had more than two but less than ten years seniority and whose job was eliminated under the Award, shall retain their seniority rights unless and until offered by the carrier another comparable job for which he was or might become qualified. Under the Award a fireman who accepted a comparable job retained his seniority rights for a period not exceeding five years but, a fireman who declined to accept such comparable job, forfeited his employment relationships and seniority rights and became entitled to a "severance allowance" which, in the case of the average fireman, amounted to about $5,600.

The Railroad Unemployment Insurance Act, 45 U.S.C. §354, provides that an applicant for unemployment benefits who left work "voluntarily" is ineligible unless he left work voluntarily with "good cause" and, further, that an applicant who fails, without good cause, to accept "suitable" work available and offered to him, becomes ineligible for a period of 30 days.

The Railroad Retirement Board is charged with the administration of the program of unemployment benefits for railroad workers established by the Railroad Unemployment Insurance Act (45 U.S.C. §§351-367).

In a memorandum of June 5, 1964, addressed to Regional Directors and Chief of Claims Operations of the Railroad Retirement Board, the Director of Unemployment and Sickness Insurance of the Board advised that a fireman who was offered comparable work but who, declining to accept it, elected to take the

separation allowance instead, was not to be considered as having left work "voluntarily without good cause," within the meaning of the Railroad Unemployment Insurance Act 45 U.S.C. §354 and, further, that refusal of a fireman to accept a "comparable" job was not to be considered to be a failure, without good cause, to accept "suitable" work—within the meaning of that section.

The Court finds that defendants have been and now are paying out and will continue to pay out substantial sums of money each week from the Unemployment Insurance Account pursuant to said administrative ruling.

Plaintiffs contend that this interpretation of the Railroad Unemployment Insurance Act as applied to the provisions of Part C(6) of the Arbitration Award, is improper and unlawful and, further, that in any event the Retirement Board is obliged to but has failed to determine *with respect to each fireman applicant* whether he left work "voluntarily" with or without "good cause" and whether he failed, "without good cause" to accept "suitable work"; that the Railroad Unemployment Insurance Fund to which they are required by law to make contributions, 45 U.S.C. §358, and out of which benefits are paid, will be adversely affected by these improper payments and that the time when plaintiffs can expect to enjoy a lower percentage payment will be delayed.

Defendants contend that their interpretation and administration of The Railroad Unemployment Insurance Act is proper and lawful; that it correctly reached the general conclusion that firemen accepting the severance allowance could not be regarded as having acted without good cause either with respect to voluntarily leaving or failing to accept suitable work.

The Board justifies its general ruling of June 5, 1964, upon the ground that the provisions of Section 354, concerning voluntary leaving of "work" without good cause, is properly referable only to the particular work in which the employee had been engaged, i.e., the "job" he held at the time he separated from

railroad employment, as distinguished from leaving general railroad employment status under the elective provisions of Part C (6) of the Arbitration Award; that the leaving of a job, which became non-existent under the Award, could not under any circumstances be deemed "voluntary".

The Board further justifies its general ruling upon the ground that a fireman, who is given a choice under the Arbitration Award of either separation of his employment status or acceptance of another comparable job, and who chooses separation, could not be considered under any circumstances as having refused, without good cause, to accept "suitable" work within the meaning of Section 354.

Upon this interpretation of the law, as applied to the so-called C(6) firemen, the Board contends it would be irrelevant and idle to inquire into, and make findings upon, the specific issues in each case of "voluntariness," "suitable work" or "good cause."

Defendants further contend that plaintiffs have no right or standing in this action to subject the decision of the Retirement Board to review and that, in any event, plaintiffs are unable to establish any certain, immediate or irreparable damage.

For the purposes of the pending motion for a preliminary injunction it is not necessary for the Court to finally determine the propriety and lawfulness of the Board's interpretation and administration of the Unemployment Insurance Act so far as these C(6) firemen are concerned.

The substantiality of plaintiffs' contentions on that issue is relevant to the motion for preliminary injunction only insofar as it bears upon the question whether there is reasonable possibility that the plaintiffs will prevail in the action.

The Court finds that in this matter the Board has acted well within the limits of the discretion vested in it by law; See—*Udall* v. *Tallman,* 380 U.S. 1 (1965); *Wilbur* v. *United States,* 281 U.S. 206 (1929); *Adams* v. *Nagle,* 303 U.S. 532 (1938);

and that the possibility of plaintiffs prevailing upon their contention is doubtful, rather than reasonably probable.

Taking up now defendants' further contention that plaintiffs have no right or standing to review the Board's determination in this action, The Railroad Unemployment Insurance Act, 45 U.S.C. §355, provides that findings and conclusions of the Board in the determination of any claim for benefits or refund, and the determination of the Board that unexpended funds in the account are available for the payment of any claim for benefits or refund, shall be binding and conclusive for all purposes, including the Comptroller General, and shall not be subject to review in any manner except that certain final decisions of the Board may be reviewed upon petition to the United States Court of Appeals. This right of review is limited to claimants whose claims to benefits are disallowed, except that railroads may so contest any alleged employer-employee relationship of a particular claimant and may also contest the issue whether the railroad should be required to pay contributions required of it by the Board under the Act or to receive any refund thereof.

In *Railway Express Agency* v. *Kennedy,* 189 F.2d 801 (7th Cir. 1951), affirming 95 F. Supp. 788 (N.D. Ill. 1950), the only case in point and the only case, so far as the Court can ascertain, wherein a carrier has sought to review the Board's determination of claims for unemployment benefits, the Court held that the decision of the Board is final and conclusive, except for the review provided in Sec. 355(f); that only employees have the right of review of such determinations; that the railroad's contributions to the unemployment fund are "taxes" and that as such taxpayer, without specific interest or control over the Unemployment Fund, it has no standing to sue. See also, *Gange* v. *Rowley,* 326 U.S. 295 (1945).

The Court finds that there is no substantial possibility that plaintiffs will be able to prevail upon their contention that they

have standing in this action to subject the decision of the Board to review.

Concerning defendants' contention that defendants have failed to show that, absent a preliminary injunction, they will sustain such irreparable damage as will justify such relief, the Court notes the provisions of The Railroad Unemployment Insurance Act, 45 U.S.C. § 358; which sets forth the statutory system under which the railroads make their contributions to The Unemployment Insurance Fund.

This system is such that, although the effect of the payment of the benefit claims in question may ultimately be reflected in the contributions or contribution rates required from plaintiffs, such possibility, depending upon many factors, is a bare, problematical and remote possibility of some such detriment in the future. It is not, and the Court so finds, such certain, immediate probability of irreparable detriment as would justify issuance of a preliminary injunction affecting, not only public interest and policy, but also the claims of the so-called C(6) firemen who are neither parties to nor represented in this action. (See—*Railway Express* v. *Kennedy,* supra at 804-805 and *Gange* v. *Rowley,* supra).

Upon these findings the Court concludes that plaintiffs' motion for preliminary injunction should be and is hereby denied.

The Court reserves ruling on defendants' motion to dismiss or, in the alternative, for summary judgment pending plaintiffs' filing of its objections thereto, and such further affidavits or memoranda as plaintiffs may desire to present upon that motion. Plaintiffs are granted 15 days from service of this order for that purpose and defendants 10 days thereafter for reply.

Dated: November 23rd, 1965.

W. T. SWEIGERT
United States District Judge

Appendix C

Opinion of the District Court in Case No. 21377

In the United States District Court for the Northern District of California, Southern Division

The Western Pacific Railroad Company, and The Southern Pacific Company, suing on their own behalf and on behalf of all other railroads similarly situated, *Plaintiffs,* vs. Howard W. Habermeyer, et al., *Defendants.*	No. 44304 MEMORANDUM OF DECISION

The above-entitled case is before this Court upon plaintiffs' renewal of its motion for a preliminary injunction and upon defendants' motion to dismiss or for summary judgment.

The issues involved have been previously considered by the Court in its Memorandum of Decision filed on November 24, 1965, denying plaintiffs' original application for a preliminary injunction. See *Western Pac. R.R. Co. v. Habermeyer,* 248 F. Supp. 44 (N.D. Cal. 1965).

This Court has reconsidered plaintiffs' motion for preliminary injunction in light of plaintiffs' Memorandum of Points and Authorities, filed on March 17, 1966, and the supporting affidavits of Thomas M. Healy, a member of the Railroad Retirement Board, and Gregory S. Prince, Executive Vice President and General Counsel of the Association of American Railroads.

For the reasons set forth in its November 24, 1965 Memorandum of Decision, the Court is of the opinion that plaintiffs' instant

motion for a preliminary injunction should be and hereby is denied.

With regard to defendants' motion to dismiss or for summary judgment, this Court finds from the pleadings and affidavits on file herein that there is no genuine issue as to any material fact, that, (as found in its November 24, 1965 Memorandum of Decision) the Railroad Retirement Board acted well within the limits of the discretion vested in it by law in paying unemployment benefits out of the Railroad Unemployment Insurance Account to C(6) firemen who terminated their railroad employment by accepting severance pay under the Arbitration Award and that, (as found in its November 24, 1954 [sic] Memorandum of Decision) the plaintiffs have no standing to review in this Court the aforesaid action of the Railroad Retirement Board.

It is therefore the conclusion of this Court that defendants are entitled as a matter of law to judgment. Accordingly, defendants' motion for summary judgment under Fed. R. Civ. P. 56 should be and hereby is granted.

Defendants will prepare, serve upon plaintiffs for approval as to form and present to this Court findings of fact, conclusions of law and a formal written order thereon as provided by the rules and in accordance with the views expressed herein and in the previous Memorandum of Decision of the Court.

Dated; July 10th, 1966.

W. T. SWEIGERT
United States District Judge

Appendix D

Pertinent Provisions of the Railroad Unemployment Insurance Act.

SECTION 1(k)

(k) Subject to the provisions of section 4 of this Act, (1) a day of unemployment, with respect to any employee, means a calendar day on which he is able to work and is available for work and with respect to which (i) no remuneration is payable or accrues to him, and (ii) he has, in accordance with such regulations as the Board may prescribe, registered at an employment office; . . . .

SECTION 4

DISQUALIFYING CONDITIONS

SEC. 4. (a-1) There shall not be considered as a day of unemployment or as a day of sickness, with respect to any employee—

(i) any of the seventy-five days beginning with the first day of any registration period with respect to which the Board finds that he knowingly made or aided in making or caused to be made any false or fraudulent statement or claim for the purpose of causing benefits to be paid;

(ii) any day in any period with respect to which the Board finds that he is receiving or will have received annuity payments or pensions under the Railroad Retirement Act of 1935 or the Railroad Retirement Act of 1937, or insurance benefits under title II of the Social Security Act, or unemployment, maternity, or sickness benefits under an unemployment, maternity, or sickness compensation law other than this Act, or any other social insurance payments under any law: *Provided,* That if an employee receives or is held entitled to receive any such payments, other than unemployment, maternity, or sickness payments, with respect to any period which include days of unemployment or sickness in a registration period, after benefits under this Act for such registration period will have been paid, the amount by which such benefits under this Act will have been increased by including such days as days of unemployment or as days of

sickness shall be recoverable by the Board: *Provided further,* That, if that part of any such payment or payments, other than unemployment, maternity, or sickness payments, which is apportionable to such days of unemployment or days of sickness is less in amount than the benefits under this Act which, but for this paragraph, would be payable and not recoverable with respect to such days of unemployment or days of sickness, the preceding provisions of this paragraph shall not apply but such benefits under this Act for such days of unemployment or days of sickness shall be diminished or recoverable in the amount of such part of such other payment or payments;

(a-2) There shall not be considered as a day of unemployment, with respect to any employee—

(i) (A) subject to the provisions of subdivision (B) hereof, any of the days in the period beginning with the day with respect to which the Board finds that he left work voluntarily, and continuing until he has been paid compensation of not less than $750 with respect to time after the beginning of such period;

(B) if the Board finds that he left work voluntarily with good cause, the provisions of subdivision (A) shall not apply, with respect to him, to any day in a registration period if such period does not include any day which is in a period for which he could receive benefits under an unemployment compensation law other than this Act, and he so certifies. Such certification shall, in the absence of evidence to the contrary, be accepted subject to the penalty provisions of section 9(a) of this Act;

(ii) any of the thirty days beginning with the day with respect to which the Board finds that he failed, without good cause, to accept suitable work available on such day and offered to him, or to comply with instructions from the Board requiring him to apply for suitable work or to report, in person or by mail as the Board may require, to an employment office;

(iii) subject to the provisions of subsection (b) of this section, any day with respect to which the Board finds that

his unemployment was due to a stoppage of work because of a strike in the establishment, premises, or enterprise at which he was last employed, and the Board finds that such strike was commenced in violation of the provisions of the Railway Labor Act or in violation of the established rules and practices of a bona fide labor organization of which he was a member.

(b) The disqualification provided in section 4(a-2)(iii) of this Act shall not apply if the Board finds that—

(i) the employee is not participating in or financing or directly interested in the strike which causes the stoppage of work: *Provided,* That payment of regular union dues shall not be construed to constitute financing a strike or direct interest in a strike within the meaning of this and the following paragraphs; and

(ii) he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed in the establishment, premises, or enterprise at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute: *Provided,* That if separate types of work are commonly conducted in separate departments of a single enterprise, each such department shall, for the purposes of this subsection, be deemed to be a separate establishment, enterprise, or other premises.

(c) No work shall be deemed suitable for the purposes of section 4(a-2)(ii) of this Act, and benefits shall not be denied under this Act to any otherwise qualified employee for refusing to accept work if—

(i) the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(ii) the remuneration, hours, or other conditions of work offered are substantially less favorable to the employee than those prevailing for similar work in the locality, or the rate of remuneration is less than the union wage rate, if any, for similar work in the locality;

(iii) as a condition of being employed he would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

(iv) acceptance of the work would require him to engage in activities in violation of law or which, by reason of their being in violation of reasonable requirements of the constitution, by-laws, or similar regulations of a bona fide labor organization of which he is a member, would subject him to expulsion from such labor organization; or

(v) acceptance of the work would subject him to loss of substantial seniority rights under any collective bargaining agreement between a railway labor organization, organized in accordance with the provisions of the Railway Labor Act, and any other employer.

(d) In determining, within the limitations of section 4(c) of this Act, whether or not any work is suitable for an employee for the purposes of section 4(a-2)(ii) of this Act, the Board shall consider, in addition to such other factors as it deems relevant, (i) the current practices recognized by management and labor with respect to such work; (ii) the degree of risk involved to such employee's health, safety, and morals; (iii) his physical fitness and prior training; (iv) his experience and prior earnings; (v) his length of unemployment and prospects for securing work in his customary occupation; and (vi) the distance of the available work from his residence and from his most recent work.

(e) For the purposes of section 4(a-2)(i) of this Act, no voluntary leaving of work shall be deemed to have been without good cause if the Board finds that such work would not have been suitable for the purposes of section 4(a-2)(ii) of this Act.

SECTION 5

CLAIMS FOR BENEFITS

SEC. 5. (a) Claims for benefits and appeals from determinations with respect thereto shall be made in accordance with such regulations as the Board shall prescribe. Each employer shall post

and maintain, in places readily accessible to employees in his service, such printed statements concerning such regulations as the Board supplies to him for such purpose, and shall keep available to his employees copies of such printed statements. Such printed statements shall be supplied by the Board to each employer without cost to him.

(b) The Board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits. The Board is further authorized to hold such hearings, to conduct such investigations and other proceedings, and to establish, by regulations or otherwise, such procedures as it may deem necessary or proper for the determination of a right to benefits.

(c) Each qualified employee whose claim for benefits has been denied in whole or in part upon an initial determination with respect thereto upon a basis other than one which is reviewable pursuant to one of the succeeding paragraphs of this subsestion shall be granted an opportunity for a fair hearing thereon before a referee or such other reviewing body as the Board may establish or assign thereto.

Any claimant whose claim for benefits has been denied in an initial determination with respect thereto upon the basis of his not being a qualified employee, and any claimant who contends that under an initial determination of his claim he has been awarded the benefits at less than the proper rate, may appeal to the Board for the review of such determination. Thereupon the Board shall review the determination and for such review may designate one of its officers or employees to receive evidence and to report to the Board thereon together with recommendations. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hear-

ing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the appeals provided for in this paragraph and for decisions upon such appeal.

In any case in which benefits are awarded to a claimant in whole or in part upon the basis of pay earned in the service of a person or company found by the Board to be an employer as defined in this Act but which denies that it is such an employer, such benefits awarded on such basis shall be paid to such claimant subject to a right of recovery of such benefits. The Board shall thereupon designate one of its officers or employees to receive evidence and to report to the Board on whether such benefits should be repaid. The Board may also designate one of its officers or employees to receive evidence and report to the Board whether or not any person or company is entitled to a refund of contributions or should be required to pay contributions under this Act, regardless of whether or not any claims for benefits will have been filed upon the basis of service in the employ of such person or company, and shall follow such procedure if contributions are assessed and payment is refused or payment is made and a refund claimed upon the basis that such person or company is or will not have been liable for such contributions. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceedings and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the proceedings provided for in this paragraph and for decisions upon such proceedings.

Final decision of the Board in the cases provided for in the preceding two paragraphs shall be communicated to the claimant and to the other interested parties within fifteen days after it is made. Any properly interested party notified, as hereinabove provided, of his right to participate in the proceedings may obtain

a review of any such decision by which he claims to be aggrieved or the determination of any issue therein in the manner provided in subsection (f) of this section with respect to the review of the Board's decisions upon claims for benefits and subject to all provisions of law applicable to the review of such decisions. Subject only to such review, the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish all rights and obligations, arising under this Act, of every party notified as hereinabove provided of his right to participate in the proceedings.

Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f).

(d) The Board shall prescribe regulations governing the filing of cases with and the decision of cases by reviewing bodies, and the review of such decisions. The Board may provide for intermediate reviews of such decisions by such bodies as the Board may establish or assign thereto. The Board may (i) on its own motion review a decision of an intermediate reviewing body on the basis of the evidence previously submitted in such case, and may direct the taking of additional evidence, or (ii) permit such parties as it finds properly interested in the proceedings to take appeals to the Board. Unless a review or an appeal is had pursuant to this subsection, the decision of an intermediate reviewing body shall, subject to such regulations as the Board may prescribe, be deemed to be the final decision of the Board.

(e) In any proceeding other than a court proceedings, the rules of evidence prevailing in courts of law or equity shall not be controlling, but a full and complete record shall be kept of all proceedings and testimony, and the Board's final determination, together with its findings of fact and conclusions of law in connection therewith, shall be communicated to the parties within fifteen days after the date of such final determinations.

(f) Any claimant, or any railway labor organization organized in accordance with the provisions of the Railway Labor Act, of which claimant is a member, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Court of Appeals for the Seventh Circuit or in the United States Court of Appeals for the District of Columbia. A copy of such petition, together with initial process, shall forthwith be served upon the Board or any officer designated by it for such purpose. Service may be made upon the Board by registered mail addressed to the Chairman. Within fifteen days after receipt of service, or within such additional time as the court may allow, the Board shall file with the court in which such petition has been filed the record upon which the findings and decision complained of are based, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have exclusive jurisdiction of the proceeding and of the question determined therein, and shall give precedence in the adjucation thereof over all other civil cases not otherwise entitled by a law to precedence. It shall have power to enter a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of

fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court the additional record. The judgment and decree of the court shall be final, subject to review as in equity cases.

An applicant for review of a final decision of the Board concerning a claim for benefits shall not be liable for costs, including costs of service, or costs of printing records, except that costs may be assessed by the court against such applicant if the court determines that the proceedings for such review have been instituted or continued without reasonable ground.

(g) Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the determination of any other matter pursuant to subsection (c) of this section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this Act, shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section.

(h) Except as may be otherwise prescribed by regulations of the Board, benefits payable with respect to any period prior to the date of a final decision of the Board with respect to a claim therefor, shall be paid only after such final decision.

(i) No claimant or other properly interested person claiming benefits shall be charged fees of any kind by the Board, its employees or representatives, with respect to such claim. Any such claimant or other properly interested person may be represented by counsel or other duly authorized agent, in any proceeding before the Board or its representatives or a court, but no such counsel or agent for a claimant shall either charge or receive for

such services more than an amount approved by the Board or by the court before whom the proceedings of the Board are reviewed. Any person who violates any provision of this subsection shall be punished by a fine of not more than $10,000 or by imprisonment not exceeding one year.

Appendix E

Paragraph C(6) of the Arbitration Award.

C(6). All other firemen (helpers) with less than 10 years' seniority on the effective date of this Award shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, except as modified by and subject to the provisions of Part D of this Award, unless and until offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become, qualified. The offer of another job shall carry with it relocation expenses as provided for and under the conditions set forth in Section 10 of the Washington Job Protection Agreement of May 21, 1936, the continuation of accumulated seniority rights toward such purposes as vacation and other applicable fringe benefits, and guaranteed annual earnings, for a period not exceeding 5 years, equal to the total compensation received by each such employee as fireman (helper), hostler helper, hostler, or engineer during the last 12 months in which compensation was received prior to the date of transfer. Such offers of jobs shall be posted and made available to all qualified firemen (helpers) in order of seniority in the seniority district in which the job offered is located. If, within 7 days after notice is posted, no senior man elects to take such offered job, the most junior man then on the fireman (helper) roster in that seniority district must, within 3 days from receipt of written notice, accept the job or all of his employment and seniority rights and relations shall be terminated and, in that event, he shall be entitled to one-half the severance allowance provided for in paragraph C(3) of this Award. If such junior fireman (helper) shall fail to accept such job and thereby terminates his employment as herein provided,

the next most junior fireman (helper) on that same roster must accept the job within 3 days from receipt of written notice or forfeit all of his employment and seniority rights and relations with the allowance provided for above. In each case of refusal to accept such job offer the next most junior fireman (helper) shall be required to accept, as provided for above, or forfeit his employment and seniority rights and relations with, in each case, the allowance provided for above, until there are no firemen (helpers) with less than 10 years' seniority remaining on the seniority roster for the seniority district in which the job offer is located. Thereafter, the same procedure as is provided above shall be followed in the fireman (helper) seniority district which has its principal extra list for firemen (helpers) closest to the location of the job offered.

Appendix F

The Carter Memorandum

United States Government
MEMORANDUM

RAILROAD RETIREMENT BOARD
Chicago, Illinois 60611
June 5, 1964

TO Regional Directors
Regions 1, 2, 3, 4, 5, 6, 7 and
Chief of Claims Operations

FROM Director of Unemployment and Sickness Insurance

SUBJECT Separation from Service Under
Arbitration Board Award—Firemen with
More Than Two Years' Seniority

Under provisions of the award made by Arbitration Board No. 282, firemen with more than two years' seniority may, under certain circumstances, be given a choice between having all their employment rights terminated, with a severance allowance, or remaining in the service of their employer. It has been held that a fireman's choice of the first alternative—separation from service—will not affect his rights to unemployment benefits under the Railroad Unemployment Insurance Act for days after the separation.

Under Section II C(3) of the award, the section applying to firemen with more than two years' seniority whose average earnings have not exceeded $200 a month in the preceding 24 months, the employee's choice is between (1) separation from service and (2) remaining on the carrier's seniority lists with rights to such work as he is qualified to perform and which is available. A fireman who chooses to be separated under this provision is not to be regarded as having voluntarily left work within the meaning of Section 4(a-2)(i) of the Act.

Under Section II C(6), the section applying to firemen with less than 10 years' seniority not covered under other provisions,

the employee's choice is between (1) separation from service and (2) accepting another comparable job for which he is or may become qualified, which is offered by the carrier, the offer carrying with it guaranteed annual earnings for a certain period. A fireman confronted with this choice who chooses separation from service is not to be regarded as having failed to accept suitable work within the meaning of Section 4(a-2)(ii) of the Act.

The lump-sum severance allowance payable to employees who are separated from service under the above-described provisions of the award, does not itself prevent payment of benefits because it is not considered to be remuneration with respect to any day after the employment relationship is severed. (See also our memorandum dated May 15 concerning allowances payable to firemen with two years' seniority or less.)

Decisions on other questions about the effect on unemployment benefits of actions under the arbitration board award will be made as quickly as possible.

Sufficient copies are attached for distribution to district offices.

/s/ H. L. Carter
H. L. Carter

cc: Chief Executive Officer (3)

Appendix G

Judgment of Court of Appeals in No. 20785

United States Court of Appeals
for the Ninth Circuit

Western Pacific Railroad Company and The Southern Pacific Company suing on their own behalf and on behalf of all other railroads similarly situated, *Appellants,* vs. Howard K. Habermeyer, Thomas M. Healy and A. E. Lyon, individually and as members of the Railroad Retirement Board, et al., *Appellees.*	No. 20,785

APPEAL from the United States District Court for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Aug. 23, 1967

Appendix H

Judgment of Court of Appeals in No. 21377

United States Court of Appeals
for the Ninth Circuit

Western Pacific Railroad Company and The Southern Pacific Company suing on their own behalf and on behalf of all other railroads similarly situated, *Appellants,* vs. Howard K. Habermeyer, Thomas M. Healy and A. E. Lyon, individually and as members of the Railroad Retirement Board, et al., *Appellees.*	No. 21,377

APPEAL from the United States District Court for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Aug. 23, 1967

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No. 1041

In the Supreme Court of the United States

OCTOBER TERM, 1967

THE WESTERN PACIFIC RAILROAD COMPANY, ET AL.,
PETITIONERS

v.

HOWARD W. HARRIMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

MELVIN M. GREENWOLD,
Solicitor General,

EDWIN L. WEISL, JR.,
Assistant Attorney General,

MORTON HOLLANDER,
Special Assistant,

Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1041

THE WESTERN PACIFIC RAILROAD COMPANY, ET AL., PETITIONERS

v.

HOWARD W. HABERMEYER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Northern District of California, Southern Division, denying petitioners' motion for a preliminary injunction (Pet. App. 12a–17a)[1] is reported at 248 F. Supp. 44. The District Court's memorandum opinion granting respondents' motion for summary judgment dismissing the action (Pet. App. 18a–19a) is unreported. The opinion of the United

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari. "R." refers to the relevant volume of the certified transcript of the record in the court of appeals, which petitioners have filed with the Clerk of this Court.

States Court of Appeals for the Ninth Circuit (Pet. App. 1a–11a) is reported at 382 F. 2d 1003.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1967. A timely petition for rehearing was denied on October 25, 1967. The petition for a writ of certiorari was filed on January 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in light of the particular facts here involved, both courts below correctly held that the railroad petitioners were precluded from challenging or enjoining the award of unemployment benefits to their former employees under the Railroad Unemployment Insurance Act.

STATUTE INVOLVED

Sections 4 and 5 of the Railroad Unemployment Insurance Act, 45 U.S.C. 351–404 (1964), as amended (Supp. II, 1965–66), are reprinted in the Appendix to the petition (pp. 20a–29a). Other pertinent provisions of the Act are set out in the Appendix, *infra*, pp. 13–15.

STATEMENT

In August 1963, Congress appointed an arbitration board to resolve the long-standing controversy over the railroads' desire to eliminate the jobs of firemen. Public Law 88–108, 77 Stat. 132. Paragraph C(6) of the arbitration award, which was rendered in November 1963, provided that firemen whose jobs were to be eliminated and who had more than two and less than ten years' seniority (hereinafter "C(6) firemen")

should retain their rights to engine service assignments until they were offered comparable jobs such as engineer, fireman, brakeman or clerk, and that if a C(6) fireman refused the offer of a comparable job he would forfeit his employment and seniority rights subject to his right to obtain a severance allowance (Pet. App. 30a–31a). A large number of C(6) firemen elected to take the severance allowance rather than another type of job. Many of these men were unable to secure other work and subsequently applied for unemployment insurance benefits under the Railroad Unemployment Insurance Act, 45 U.S.C. 351–404 (1964), as amended (Supp. II, 1965–66) (R. II, 91).

Section 4(a–2) of the Act, 45 U.S.C. 354(a–2), provides that a claimant for benefits will not be considered unemployed if the Railroad Retirement Board finds that he "left work voluntarily" without "good cause," and that his benefits will be postponed for a thirty-day period if the Board finds that he "failed, without good cause, to accept suitable work available * * * and offered to him * * *." On June 5, 1964, the Board, acting through its delegate, the Director of Unemployment and Sickness Insurance,[2] determined that C(6) firemen who elected to take severance pay rather than a comparable job were not to be regarded as having left work "voluntarily" or to have "failed, without good cause, to accept suitable work" within the meaning of Section 4(a–2) (Pet. App. 32a–33a). In processing the claims of C(6) firemen the Board has continued to require that all the statutory

[2] The authority for the delegation is found in 45 U.S.C. 355(b) and 362(m) (1964), and 20 C.F.R. 320.5.

eligibility requirements be met before paying benefit claims (R. II, 93).

Petitioners, two of the railroads that are employers within the meaning of the Act, thereafter instituted this action in the United States District Court for the Northern District of California, Southern Division, against the members and officials of the Railroad Retirement Board, seeking (1) an injunction prohibiting the payment of unemployment benefits to any C(6) firemen electing to take severance pay rather than a comparable job and (2) a declaration that the Board misconstrued the Act in ruling that these C(6) firemen were not disqualified from receiving unemployment benefits (R. II, 1–31; R. IV, 170–172). Petitioners also sought a declaration that the Board erred in failing to make specific findings as to the eligibility for benefits of each C(6) fireman.

The district court denied petitioners' motion for a preliminary injunction (Pet. App. 12a–17a), and granted the respondents' motion for summary judgment dismissing the action (Pet. App. 18a–19a). The court of appeals unanimously affirmed both orders (Pet. App. 1a–11a). The court of appeals rejected petitioners' procedural contention, holding that the Board's ruling on the common question of law presented by the claims of the C(6) firemen was necessary to "assure a reasonable degree of uniformity in the application of the Act to benefit claims," that the application of the Board's ruling to individual claims meets any requirement in the Act that findings be made with respect to each claimant, and that the procedure followed by the Board was "in line with

the type of administration authorized by the Act" (Pet. App. 4a–6a).[3] The court of appeals did not find it necessary to pass upon petitioners' contention that the Board misconstrued the Act in ruling that the C(6) firemen were not disqualified, holding that the Act precluded judicial review of this question (Pet. App. 6a–11a).[4]

ARGUMENT

1. The court of appeals was plainly correct in ruling that the Railroad Unemployment Insurance Act, 45 U.S.C. 351–404 (1964), as amended (Supp. II, 1965–66), precludes judicial review of Board determinations granting claims for benefits. Subsections 5(c) and 5(f) of the Act, 45 U.S.C. 355(c) and (f) (Pet. App. 24a–26a, 27a–28a), provide for judicial review of Board determinations in an appropriate court of appeals in three specified cases, not including grants of claims for benefits.[5] Subsection 5(g) of the Act makes clear that judicial review is precluded in all other instances:

> (g) Findings of fact and conclusions of law of the Board in the determination of any claim

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[3] The court found it unnecessary to decide whether 45 U.S.C. 355(b) authorizes but does not require findings each time an applicant applies for benefits (Pet. App. 6a, n. 4).

[4] Although, as noted, the court rejected petitioners' procedural contention, it stated that this issue also was not subject to judicial review (Pet. App. 11a).

[5] Judicial review is authorized: (1) where an employee or his union seeks review of a denial of a claim for benefits; (2) where an employer seeks review of a determination that an individual who has been paid benefits is in fact an employee; and (3) where an employer seeks review of a decision requiring it to make contributions to the insurance fund or denying its claim for refund of such contributions.

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> for benefits or refund, the determination of any other matter pursuant to subsection (c) of this section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this chapter, shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section.[6]

The legislative history of the Act confirms that Congress intended to preclude suit by an employer to enjoin the payment of unemployment benefits to its

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[6] There is no merit in petitioners' contention (Pet. 21–24) that subsection 5(g) precludes judicial review only of those matters to which Subsections 5(c) and 5(f) relate and therefore does not preclude judicial review of Board determinations granting benefit claims. By its terms, subsection 5(g) applies to *all* "[f]indings of fact and conclusions of law of the Board in the determination of any claim for benefits * * *," which would include determinations granting as well as denying claims. Congress obviously intended to preclude judicial review of determinations granting claims since the finality provision in subsection 5(g) applies specifically to the Comptroller General, who would be primarily interested in claims that are granted. Petitioners' grammatical argument was fully answered by the court of appeals' analysis of the statute (Pet. App. 10a–11a). As the court noted, the word "other" in the second clause of subsection 5(g) merely expands the first clause of subsection 5(g) to preclude judicial review of determinations which are covered by subsection 5(c) but which are unrelated to claims for benefits or refunds.

former employees. When the statute was enacted by Congress in 1938, railroad spokesmen complained during the congressional hearings that "there is no appeal provided anywhere in the bill for the railroads which pay the freight."[7] Congress, however, did not change the judicial review provisions of the Act to meet the railroads' objections. Moreover, the congressional hearings in 1945 on a bill which, *inter alia,* provided for judicial review in the courts of appeals rather than, as formerly, in the United States district courts, made clear the understanding of both Congress and the railroads that an employer has no right to judicial review of grants of unemployment benefits to its former employees.[8] Indeed, in thirty years of administration of the Act, there has been only one attempt by an employer, other than the instant case, to contest benefit payments to employees. In that case, *Railway Express Agency* v. *Kennedy,* 189 F. 2d 801, certiorari denied, 342 U.S. 830, the Seventh Circuit also held that the Act precluded maintenance of the action (see Pet. App. 11a, 16a).

2. There is no merit in petitioners' contention that, in precluding the maintenance of this suit, Congress

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[7] Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 10127, 75th Cong., 3d Sess., p. 214; Hearings before the Senate Committee on Interstate Commerce on S. 3772, 75th Cong., 3d Sess., p. 125.

[8] Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 1362, 79th Cong., 1st Sess., p. 1091. Although only "annuities" were mentioned specifically, the discussion concerned judicial review provisions which the amendments were to make common to both the Railroad Retirement and Unemployment Insurance Acts.

violated Article III or the Due Process Clause of the Constitution.[9] The cases cited by petitioners (Pet. 13–19) involved administrative orders which operated directly upon the parties concerned and substantially affected their legal interests.[10] In contrast, petitioners, who were not parties to the Board proceedings, cannot show that the administrative ruling sought to be reviewed here will have any substantial impact on their economic or other legal interests. They have no property interest in nor any control over the Treasury fund (the Railroad Unemployment Insurance Account) which is the source of the unemployment benefits paid out by the Railroad Retirement Board. See 45 U.S.C. 360 (Supp. II, 1965–66). Moreover, petitioners cannot demonstrate that the Board's ruling will have any significant effect on the contributions which they must make to that fund. 45 U.S.C. 358(a) (Supp. II, 1965–66) requires that an employer contribute to the fund a specified percentage of the total compensation which it has paid to its employees during the preceding calendar year; the employer's contribution does not depend upon the amount of unemployment benefits which

[9] Petitioners adverted to constitutional "problems" at pages 55 and 56 of their 66-page opening brief in the court of appeals.

[10] *E.g.*, *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, and *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134 U.S. 418, involved challenges to confiscatory rate orders; *Estep* v. *United States*, 327 U.S. 114, involved a criminal prosecution for violation of an induction order; *Crowell* v. *Benson*, 285 U.S. 22, involved an employer's individual liability to his employee for benefits under the Longshoremen's and Harbor Workers' Compensation Act.

are paid to its former employees."[11] In view of the insubstantiality of petitioners' interests, and the need for finality and deference to administrative judgment in the specialized field here involved, the instant case plainly falls within the body of decisions in which this Court has sustained congressional preclusion of judicial review. See 4 Davis, *Administrative Law,* Secs. 28.18–28.19 (1958).

3. Petitioners cannot in any event overturn the Board's ruling that the C(6) firemen were not disqualified from receiving unemployment insurance benefits under the Act because they elected, pursuant to the arbitration award, to take severance pay rather than a comparable job. The Board's determination effectuates the clear intent of the arbitration award and of Congress to preserve to the C(6) firemen a free election which will not result in a denial of the benefits

[11] The likelihood that the unemployment benefits at stake here will have an effect on the amount of petitioners' future contributions is remote. Petitioners assert that more than $2.5 million in unemployment benefits have already been paid out (Pet. 7), and that approximately $650,000 in benefits remain unpaid (R. IV, 176). However, since the record shows that the deficit in the Treasury fund is approximately $270 million and the annual excess of fund income over outgo is approximately $17 million, it would be about 35 years before the fund might reach such a level ($300 million) that, under the present statutory formula, the employer's rate could be reduced from the current 4 percent to 3 percent. See 45 U.S.C. 358(a) (Supp. II, 1965–66); R. II, 84–86. This Court has held that a similar "bare possibility of some injury in the future" under a comparable State insurance statute presents no "justiciable question" entitling the employer to judicial review. *Gange Lumber Co.* v. *Rowley*, 326 U.S. 295, 305.

of the Unemployment Insurance Act.[12] Moreover, the Board's exercise of its experienced judgment in the specialized field committed to its administration must be accepted where, as here, it is reasonable.[13]

4. Finally, the court of appeals was plainly correct in holding that the Board's ruling on the common question of law presented by the claims of the C(6) firemen was necessary to "assure a reasonable degree of uniformity in the application of the Act to benefit claims" (Pet. App. 6a), that the application of the Board's ruling to individual claims meets any requirement in 45 U.S.C. 355(b) that findings be made with respect to each claimant, and that the procedure followed by the Board was "in line with the type of administration authorized by the Act" (Pet. App. 4a–6a).[14] The claim filed by the applicant, with its certifications, when accepted and acted upon by the Board, certainly constitutes any "finding" that may be re-

[12] See Hearings, *Railroad Work Rules Dispute*, before the Senate Committee on Commerce on the Administration of Public Law 88–108, 89th Cong., 1st Sess., p. 332 (1965); R. II, 91–92, 135a–135d.

[13] See, *e.g.*, *Boske* v. *Comingore*, 177 U.S. 459; *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143, 153–154; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309; *Udall* v. *Tallman*, 380 U.S. 1, 16. See also *Brotherhood of Railway and Steamship Clerks* v. *Railroad Retirement Board*, 239 F. 2d 37, 44 (C.A.D.C.).

[14] The court of appeals found it unnecessary to decide whether the Act authorizes but does not require findings each time an applicant applies for benefits (Pet. App. 6a, n. 4). See 45 U.S.C. 355(b), which authorizes the Board to establish "such procedures as it may deem necessary or proper for the determination of a right to benefits." See also 45 U.S.C. 362(i), which provides that the Board may accept the claimant's registration as initial proof of unemployment, sufficient to certify payment of benefits.

quired by the statute (see R. II, 87–95; R. IV, 220–226).[15]

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[15] Petitioners' action must fail for several additional reasons not reached by the court of appeals.

First, petitioners lack standing to maintain this action. Since their sole interest is that they must make contributions to the Treasury fund, and the possibility that the amount of these contributions will be affected by the payment of the contested benefits is extremely remote (see note 11, *supra*), the Board's ruling does not affect petitioners' substantial legal interests. The instant situation is thus wholly unlike that in *Stark* v. *Wickard*, 321 U.S. 288, where the Court held that milk producers had standing to challenge the legality of deductions from funds in which they had a personal, legally protected claim.

Second, petitioners' attempt to enjoin the Board from paying unemployment benefits clearly constitutes an unconsented suit against the United States, since the judgment sought would interfere with the statutory program established for the benefit of unemployed railroad workers and thus "interfere with the public administration." *Dugan* v. *Rank*, 372 U.S. 609, 620. Petitioners' contention that the unconsented suit doctrine is inapplicable because the Board acted in excess of its authority (Pet. 12, n. 14) is based upon the false premise, rejected by the court of appeals (Pet. App. 4a–6a), that the Board failed to make findings mandated by the Act (see *supra*, pp. 10–11).

Third, the injunctive relief sought by petitioners would, of course, adversely affect the interests of the C(6) firemen who are neither parties to nor represented in this action. It seems clear that the litigation should not be allowed to proceed without some representation of these individuals. See *Litchfield* v. *Register and Receiver*, 9 Wall. 575; *Metropolis Theatre Co.* v. *Barkhausen*, 170 F. 2d 481, 485 (C.A. 7), certiorari denied, 336 U.S. 945.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

EDWIN L. WEISL, JR.,
Assistant Attorney General.

MORTON HOLLANDER,
LEONARD SCHAITMAN,
Attorneys.

FEBRUARY 1968.

APPENDIX

Pertinent provisions of the Railroad Unemployment Insurance Act, 45 U.S.C. 351–404 (1964), as amended (Supp. II, 1965–66), which are not reprinted in the Appendix to the petition, provide as follows:

Section 8, 45 U.S.C. 358 (Supp. II, 1965–66):

§ 358. Contributions.

(a) Employers' contributions.

Every employer shall pay a contribution, with respect to having employees in his service, equal to the percentage determined as set forth below of so much of the compensation as is not in excess of $300 for any calendar month paid by him to any employee for services rendered to him after June 30, 1939, and before July 1, 1954, and is not in excess of $350 for any calendar month paid by him to any employee for services rendered to him after June 30, 1954, and before June 1, 1959, and is not in excess of $400 for any calendar month paid by him to any employee for services rendered to him after May 31, 1959:

* * * * *

1. With respect to compensation paid prior to January 1, 1948, the rate shall be 3 per centum;

2. With respect to compensation paid after the month in which this chapter was

amended in 1959, the rate shall be as follows:

If the balance to the credit of the railroad unemployment insurance account as of the close of business on September 30 of any year, as determined by the Board, is:	The rate with respect to compensation paid during the next succeeding calendar year shall be:
	Percent
$450,000,000 or more	1½
$400,000,000 or more but less than $450,000,000	2
$350,000,000 or more but less than $400,000,000	2½
$300,000,000 or more but less than $350,000,000	3
Less than $300,000,000	4

* * * * *

Section 10, 45 U.S.C. 360 (Supp. II, 1965–66):

§ 360. Railroad unemployment insurance account.

(a) Funds constituting account; availability for benefits or refunds.

The Secretary of the Treasury shall maintain in the unemployment trust fund established pursuant to section 1104 of Title 42 an account to be known as the railroad unemployment insurance account. This account shall consist of (i) such part of all contributions collected pursuant to section 358 of this title as is in excess of 0.25 per centum of the total compensation on which such contributions are based, together with all interest collected pursuant to section 358(g) of this title; * * *,

(b) Payment of benefits or refunds.

All moneys in the account shall be used solely for the payment of the benefits and refunds provided for by this chapter. * * *

* * * * *

Section 12, 45 U.S.C. 362:

§ 362. Duties and powers of Board.

* * * * *

(i) Free employment offices; registration of unemployed; statements of sickness; reemployment.

* * * * *

The Board shall prescribe a procedure for registration of unemployed employees at employment offices. Such procedure for registration

shall be prescribed with a view to such registration affording substantial evidence of the days of unemployment of the employees who register. The Board may, when such registration is made personally by an employee, accept such registration as initial proof of unemployment sufficient to certify for payment a claim for benefits.

* * * * *

(m) Delegation of powers.

The Board is authorized to delegate to any member, officer, or employee of the Board any of the powers conferred upon the Board by this chapter, excluding only the power to prescribe rules and regulations.

* * * * *

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OCTOBER TERM, 1967

No. 1041

THE WESTERN PACIFIC RAILROAD COMPANY, and the SOUTHERN PACIFIC COMPANY, suing on their own behalf and on behalf of all other railroads similarly situated, *Petitioners,*

vs.

HOWARD W. HABERMEYER, THOMAS M. HEALY, and A. E. LYON, individually and as members of the Railroad Retirement Board; SAMUEL CHMELL, individually and as Director, Bureau of Unemployment and Sickness Insurance of said Board; DEAN W. STODDARD, individually and as Chief, Division of Claims Operations of said Board; and H. H. DASHIELL, Director, Atlanta Region; JOHN J. FINNERTY, Director, New York Region; FRANK J. SHEA, Director, Cleveland Region; CHARLES L. HOLLER, Director, Chicago Region; RAYMOND W. LUSK, Director, Dallas Region; WILLIAM R. CALWELL, Director, Kansas City Region; WALTER J. MACKLIN, Director, San Francisco Region, each individually and as Directors of said Regions under said Board, *Respondents.*

Petitioners' Reply Brief

BURNHAM ENERSEN
601 California Street
San Francisco, California 94108

RICHARD MURRAY
601 California Street
San Francisco, California 94108
Attorneys for Petitioners

Of Counsel
McCUTCHEN, DOYLE, BROWN & ENERSEN
601 California Street
San Francisco, California 94108

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Petitioners' Reply Brief

The petition for certiorari essentially presents two questions: whether Congress, even if it wished, could constitutionally pro-

hibit all judicial control over agency action which is in excess of statutory power and which substantially and adversely affects the interests of those seeking judicial review; and whether, in the light of these constitutional questions, an intent to forbid all judicial review whatever of the Board's actions should nevertheless be attributed to Congress. (Pet. 2-3, 11-24).

Respondents' brief deals with the latter question not at all and with the former only obliquely, and in a manner which obscures, rather than illuminates, the constitutional issues which lie at the heart of the case. (Br. in Opp. 7-9).

Respondents do agree that the Court of Appeals has read the statute as precluding all judicial review whatever of the granting by the Board of claims for benefits. (Br. in Opp. 5 and Note 4). Respondents also apparently agree—for they make no argument to the contrary—that a Federal official may not constitutionally be made the final judge of his own powers, and that, where substantial interests are adversely affected by administrative action, judicial review, at some time, is compelled by the Constitution. (Br. in Opp. 8).

What position, then, do respondents take? Though as yet unclear in its contours, respondents' contention seems to run along these lines: that petitioners' interest in preventing the unlawful waste of the Account is supposedly not "substantial" enough to outweigh the "deference" owed by the courts to the decisions of administrative tribunals. (Br. in Opp. 7-9).

The point first mustered in support of this suggestion is that petitioners "were not parties" to the Board proceedings. Indeed they were not, for respondents gave them neither notice nor an opportunity to be heard. (R.V. 2, pp. 18-20). But how do such facts advance respondents' argument? It can hardly be contended that, because one was not permitted to be heard in connection

with the making of an agency decision, he therefore has no right to complain concerning its effects upon him.

Respondents say next that petitioners "have no property interest" in the Account. Of course petitioners do not "own" the Account or the sums which it may contain; but it obviously does not follow that petitioners have no interest in the legality of the disbursements which respondents make from the Account. Petitioners and the class of 775 railroads which they represent contribute more than 85% of all amounts paid into the Account, and it is they and the other railroad employers who must, of necessity, replace every dollar which is disbursed from the Account. Though administered by the Board, the Account, in an economic sense, is essentially a private fund maintained by the railroads for the benefit of their own employees.* It cannot rationally be maintained that the railroads have no substantial interest in maintaining the integrity of such a fund or in preventing its unlawful dissipation.

Finally, respondents argue that, because it cannot be predicted with certainty *when* (as opposed to *whether*) the railroads will feel the bite of the Board's unlawful disbursements, petitioners' interests are too remote to be justiciable. Yet, respondents fail to explain why, if this were so, even an ordinary State, territorial or municipal taxpayer may challenge illegal expenditures when there is obviously no certainty when—or indeed by whom—the sums expended will be replaced by way of future taxes. See *Cole-*

*See the Hearings before the Subcommittee on Railroad Retirement of the Senate Committee on Labor and Public Welfare on S. 360, S. 945, S. 1313, S. 1630 and S. 1651, 85th Cong., 1st Sess., p. 201, where Senator Morse remarked, with respect to the Railroad Unemployment Insurance Account:

> "We are dealing here really with private funds. The best you can say is that there is simply a quasi-public obligation with respect to those funds.
>
> . . . . .
>
> "This is not a case where we are dealing with public funds, except in terms of the Federal Government's trusteeship obligations."

man v. Miller, 307 U.S. 433, 445-46 (1939); *Reynolds v. Wade*, 249 F.2d 73, 76 (9th Cir. 1957); *cf. Stark v. Wickard*, 321 U.S. 288 (1944).*

Thus, there is nothing to respondents' contention that petitioners have no substantial interest in preventing the unlawful waste of the Account. Moreover, if petitioners cannot challenge respondents' actions, plainly no one can. The necessary implication of respondents' argument, then, is that neither this nor any other Court can ever have power to restrain the actions of the Board, no matter how unlawful or improper they may be, and that the Board will therefore be made the sole and final arbiter of its own jurisdiction. It is this remarkable conclusion which respondents necessarily ask this Court to adopt when they request that certiorari be denied.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BURNHAM ENERSEN
601 California Street
San Francisco, California

RICHARD MURRAY
601 California Street
San Francisco, California

Attorneys for Petitioners

Of Counsel:
McCUTCHEN, DOYLE, BROWN & ENERSEN
601 California Street
San Francisco, California

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**Gange Lumber Co. v. Rowley*, 326 U.S. 295, 305 (1945), upon which respondents appear to rely is not in point. In *Gange* the total amount involved was only $460.50, and this Court therefore felt that any conceivable tax burden to a general taxpayer of the State of Washington might well be "infinitesimal." 326 U.S. at 304. Even when so little was at stake, the ruling in *Gange* has been called "one of the most extreme decisions in the entire law of standing. . . ." 3 Davis, *Administrative Law Treatise*, § 22.13, p. 271. Clearly, the reasoning of the *Gange* decision can hardly be applied to the present situation, where the challenged expenditures have already totalled more than $2,500,000.